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MICHAEL T. LANNERS,

Appellant,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

34 I.A. 123

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, an employee of defendant, instituted an action to recover damages for personal injuries alleged to have been sustained by him when he was assaulted by another of defendant's employees. On defendant's motion the complaint was dismissed on the ground that it failed to state a cause of action. Plaintiff appeals.

The complaint, consisting of one count, contains seven paragraphs. The first and second paragraphs allege in substance that defendant, a Kansas corporation, operated a railroad system as a common carrier of freight and passengers for hire, extending into, through, and between various States of the Union; that it maintained one of its principal places of business in the City of Chicago, Cook County, Illinois, where the plaintiff resides; that defendant was engaged in the business of commerce in, through, and between the several States of the United States as a common carrier by railroad for a long time prior to May 25, 1945; that all or a substantial part of plaintiff's duties for defendant were in furtherance of defendant's business of interstate commerce, and that at the time plaintiff was injured, on May 25, 1945, defendant was engaged in the business of

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interstate commerce and plaintiff was in its employ in furtherance of its business. ✓

The third paragraph reads as follows:

"Plaintiff further alleges that on or about the 25th day of May, 1945, while he was engaged in the course of his duties for said defendant at the 18th Street Yards in Chicago, Illinois, as engine foreman, and at about four P.M. of said day, he was caused to be suddenly, forcibly and viciously assaulted, without provocation, by J. G. Chukas, who was one of defendant's servants and agents, acting within the course and scope of his employment, and who was a member of said crew, working as a switchman; and that the said attack upon plaintiff and the assault heretofore was unjustified and unwarranted, and arose out of and by reason of the employment of the plaintiff and the said J. G. Chukas, by the said defendant; that the said defendant negligently, carelessly, wrongfully and unlawfully, and in violation of the Federal Employers' Liability Act, employed the said J. G. Chukas, and continued to keep the said J. G. Chukas in its said employment, when defendant knew, or in the exercise of ordinary and reasonable care, should have known of his vicious and dangerous propensities, and that he was generally unsuited and incompetent to perform the duties of a railroad switchman."

The remaining paragraphs of the complaint relate to the injuries suffered by the plaintiff and the damages claimed.

As grounds for reversal, the plaintiff urges (a) that the trial court's order of dismissal was erroneous in that the complaint alleges that Chukas was acting within the scope of his employment at the time plaintiff was injured; (b) that the court erred in dismissing the complaint when the complaint alleges that the defendant knew or should have known of the dangerous and vicious propensities of said Chukas who brought about plaintiff's injuries, and that defendant was negligent in retaining the said Chukas in its employ after it had received notice and actual knowledge of his vicious and dangerous propensities.

In the recent case of Tatham v. Wabash R. Co., 343 Ill. App. 221, the complaint contained similar allegations, though more specific than those in the complaint in the present case. There a motion to dismiss the complaint, because it was substantially insufficient in law, was sustained. In support of its motion to dismiss the defendant asserted, "that there was no liability under the Federal Employers' Liability Act on a railroad employer for the acts of its employees outside the scope of their employment and not in furtherance of their employer's business * * *," and that an employer was not liable for taking or retaining in its employ a person known to be habitually abusive, quarrelsome, contentious, vicious, ill tempered, and obnoxious, and from whose conduct there was danger of physical harm, where such danger existed only as the result thereof, and while such employee was pursuing a course of conduct not within the scope of his employment and not in furtherance of the business of the employer.

In the present case the complaint contains no allegations from which it could be reasonably inferred that Chukas, at the time of the alleged assault, was acting within the course and scope of his employment, nor does the complaint allege that the act complained of was in furtherance of defendant's business.

In the Tatham case, after a careful analysis of the leading cases on this question, at page 230, the court held that under the Federal Employers' Liability Act, "the master is not liable unless the assault or other conduct complained of was committed by the wrongdoer within the scope of his employment--in furtherance of his master's business--or unless the act was directed or authorized." See Davis v. Green, 260 U. S. 349; Atl. Coast Line R. R. v. Southwell, 275 U. S. 64; St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344; Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., 162 F. (2d) 110; Osmont v. Pitcairn, 349 Mo. 137, 159 S. W. (2d) 666; and Young v. New York Cent. R. Co., 88 N. E. (2d) 220.

Plaintiff says that the allegations of the complaint state a cause of action based on the violation of plaintiff's common law rights and, in addition thereto, a cause of action based on violation of the Federal Employers' Liability Act. This contention is without merit. The present action is brought under the Federal Employers' Liability Act, and therefore controlled by the decisions of the Federal courts. See Day v. Chicago and North Western Ry. Co., 354 Ill. 469. In our opinion the Tatham case is decisive of the issues presented for determination in this case.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

45465

THE EXCHANGE NATIONAL BANK,
as Trustee under Trust No.
1613, and RALPH CREDIO,
Appellants,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellee.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
COOK COUNTY

344 I.A. 1241

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an interlocutory injunction restraining them from maintaining a multiple family tenement unit in the premises at 4954 S. Ellis Avenue, Chicago, Illinois; from suffering or permitting any persons to use or occupy any part or portion of said premises if said premises are in the physical condition alleged in the counterclaim filed by defendant; from permitting or suffering the existence of any violations of the Chicago Zoning Ordinance in or about said premises, or any violations of the Building Code of the City of Chicago in the premises while same are occupied in any manner by any persons for living quarters during the pendency of the suit.

Plaintiffs filed a complaint for a declaratory judgment declaring the zoning ordinance of the City of Chicago unconstitutional, unreasonable and void in so far as it restricts use of the premises involved herein to a one-apartment or one-family dwelling. It is apparent from the complaint that plaintiffs, without proper permit from the city, had made interior alterations in the building at a cost in excess of \$9,000, and that at the time of the filing of the

complaint 12 families were residing on the premises zoned for single family residence. The defendant City of Chicago answered the complaint and filed a counterclaim in which it asked for an injunction restraining plaintiffs from maintaining a multiple family tenement unit on the premises. This answer and counterclaim was filed without leave of court after the return day of the summons. On February 13, 1951, defendant served notice of its application for a temporary injunction and for a rule on plaintiffs to answer its counterclaim. Answer to the counterclaim was filed on February 14, 1951. This counterclaim raises an issue of fact as to change of conditions in the block in which the premises are located since the passage of the zoning ordinance, and as to other matters affecting defendant's right to a temporary injunction. The court's attention was directed to the filing of the answer. The order granting the temporary injunction was granted without hearing evidence, contrary to the rule announced in Miller v. Chicago Transit Authority, 339 Ill. App. 398, Moss v. Balch, 320 Ill. App. 135, and Crown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430. For this error the order is reversed and the cause remanded without prejudice to any further application for temporary injunction defendant may desire to make.

ORDER REVERSED AND CAUSE
REMANDED.

Burke, P. J., concurs.
Friend, J., took no part.

Abstract

34 I.A. 124²

Judge Presiding.

Defendant met plaintiff, an accountant, at a meeting of the Retail Liquor Dealers Association at which plaintiff had explained certain tax problems. The parties discussed defendant's

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alleged overpayment of taxes, and, according to defendant's testimony, when he told plaintiff that an attorney had requested \$500.00 to handle the case, plaintiff stated that he would take it for considerably less. Plaintiff, however, testified that he had told defendant that he would not charge him that sum for a retainer.

Pursuant to this conversation defendant brought his files for 1943 and 1944, the years of the alleged overpayment, to plaintiff's office, and plaintiff prepared two claims for tax refunds. It is undisputed that there was no discussion of fees at that time. In February, 1946, some four months later, plaintiff submitted a bill for \$145.00 for "auditing books and preparing claims for refund--1943-1944." On this same bill there was itemized a charge of \$27.50 for preparing defendant's 1946 income tax estimate.

Defendant paid the \$27.50, and with reference to the balance, he testified that plaintiff informed him that the \$145.00 could be paid immediately, or, if defendant was "a little hard up," he could wait. In explaining the amount of the fee, plaintiff stated that it represented some 29 hours of work at \$5.00 an hour. He testified further that in 1947 or early 1948 he conferred with examining officers from the Revenue Agent's Office and from the Collector's Office in connection with these claims, but, on cross examination, plaintiff could not recall the number of these occasions, or any of the persons with whom he consulted.

In June or July of 1948 defendant received his first refund for the 1943 tax claim in the amount of \$1,177.66, and immediately went to plaintiff's office with the check. Plaintiff inquired whether he had sent defendant a statement, and when defendant replied that plaintiff had sent a bill for \$145.00 but that he didn't know where it was, plaintiff thereupon refigured his fee on the basis of 20 percent of the refund, which amounted to \$235. Upon being informed that this sum was \$90.00 in excess of

the original bill, plaintiff stated that his usual fee was 25 percent, however he was only charging defendant 20 percent. Defendant protested, but paid the additional sum, stating, "If that's it, that's it."

Plaintiff insists, and defendant denies, that plaintiff requested to be notified if and when the second refund arrived. Plaintiff thereafter sent defendant a bill for \$400.00 which defendant disregarded; and when defendant received the 1944 refund, he informed plaintiff that he had already paid \$90.00 more than the original bill, which sum should be sufficient.

At the suggestion of the trial court that there should be outside testimony on the matter of fees, the witness William Krieger, a certified public accountant and experienced tax counsellor, testified, over objection, that in his own business there were two ways of computing fees for income tax services, either on a per diem basis predicated on the number of hours and amount of work done, or on an agreed percentage of the amount of the refund. His own per diem charge was \$100.00 per day, or, according to the other method of computation, approximately 25 percent of the amount of the refund.

Another expert witness testified, in response to a subpoena, that the customary fee where the matter is not subject to a contract depended upon the time element, the difficulties in the case, and the amount of research necessary, "since every case was different on the facts." The court sustained plaintiff's objection to defendant's question concerning the customary method used by accountants to establish contingent fee charges, and to defendant's question as to what would be the fair and customary charge for additional services in the prosecution of a claim which an accountant had prepared, and for which he had already charged \$145.00 for such preparation. In response to the court's query, this witness stated that where the fee was to be wholly contingent, a reasonable maximum would be from 15 to 25 percent.

[illegible]

On the basis of substantially the foregoing evidence, the circuit court entered judgment for plaintiff in the amount of \$432.80, from which defendant has prosecuted this appeal.

It is apparent from the record that the parties did not enter into a contract with reference to fees at the time plaintiff audited and prepared defendant's 1943 and 1944 refund claims, or at any time prior thereto. Plaintiff's alleged remark that his services would cost defendant a lot less than the \$500.00 requested by an attorney for handling the case, was merely a bid for business. However, the bill for \$145.00 submitted by plaintiff in February 1946, some 4 months after the work was completed, evidenced an understanding between the parties that plaintiff was to be compensated for his services in auditing and preparing these claims, irrespective of the action thereon by the Treasury Department. Plaintiff's charge for his services was predicated on 29 hours of work at \$5.00 an hour, in connection with both claims, and was not based upon any percentage of the rebates claimed.

Although plaintiff may have stated that this bill need not be paid immediately, it is clear that the charge was fixed and absolute, just as the charge of \$27.50 for defendant's 1946 tax estimate which was itemized on the same bill. It was not contingent on the outcome of the refund claims, but would have had to be paid irrespective of the disposition of the claims by the Treasury Department. There was no reference by plaintiff at that time to any further fees, contingent or otherwise, if the claims were allowed. Nor did plaintiff state or infer that the \$145.00 was merely to be regarded as a retainer or part payment of either or both claims.

When the first refund arrived and defendant asked plaintiff what he owed, plaintiff, after being apprised that he had already submitted a bill and the amount thereof, recomputed his fee, not on the basis of hours of service, but upon a percentage of this refund, and the charges amounted to \$235.00. He endeavored to justify the additional \$90.00 on the ground that he had had a number of conferences with Treasury Officials after the original

On the basis of substantially the foregoing evidence, the
circuit court entered judgment for defendant in the amount of
\$425.00, from which defendant has appealed this appeal.
It is respectfully requested that the court set aside the
judgment entered in the above case and enter judgment for
plaintiff in the amount of \$425.00, with interest thereon
from the date of the entry of the judgment for defendant
until the date of the entry of the judgment for plaintiff,
at the rate of six per cent per annum, and award plaintiff
costs of this appeal. The plaintiff prays for judgment
according to the facts and circumstances herein stated.
Very respectfully,
J. H. [Name], Plaintiff.
[Name], Attorney for Plaintiff.
[Name], Defendant.
[Name], Attorney for Defendant.

bill was submitted, although he could not recall how many conferences, or when they occurred, or with whom.

Assuming such conferences did in fact take place, the additional charge of \$90.00 apparently compensated plaintiff therefor. Hence, when defendant paid the new fee demanded by plaintiff, he justifiably assumed that all charges incidental to his claims were paid. This payment was not, as plaintiff contends, a mere agreement for a partial settlement or merely a percentage of one claim, since it absorbed a bill submitted by plaintiff covering both claims. +

When defendant's second refund arrived, plaintiff sought a further fee based upon a percentage of this refund, and amounting to \$400.00. Although plaintiff argues that this fee is predicated on a quantum meruit basis, or the value of services rendered, it is not clear what additional services he rendered to warrant the imposition of a charge of \$400.00 more. On the contrary, it is apparent that this claim, predicated purely upon a percentage of this second refund is, in effect, a contingent fee no matter how it is labelled, since the measure of recovery depends upon a fortuitous event, namely, the allowance of the refund, and is not predicated upon additional time and effort expended on defendant's behalf. There could be no percentage computation unless the contingent event occurred, whereas a fee predicated on a quantum meruit basis is based upon the nature of the services rendered, and will be imposed irrespective of any contingency.

As hereinbefore analyzed, the parties did not contract for the payment of such a contingent fee, and such an arrangement cannot be implied or construed by the court under the guise of awarding a reasonable fee, for it would violate both the Treasury Regulations and common law canons with reference to fees chargeable to clients.

The Treasury Regulations, of which this court may properly take cognizance (Lerette v. Davis, 225 Ill. App. 93; Wabash. R. R. Co. v. Campbell, 219 Ill. 312; 222 E. Chestnut St. Corp. v. Murphy, 325 Ill. App. 392), and which were referred to in the testimony before the trial court, contrary to plaintiff's assertion, provide

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Assuming a committee was appointed, it is not clear whether

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that a wholly contingent fee agreement shall not be entered into unless the financial status of the client is such that he would otherwise be unable to obtain the services of an attorney or agent. (U. S. Treasury Department Circular 230, sec. 10.2, par. Y (2)) There is no evidence in the instant case that defendant's financial status was such that he would be unable to obtain the services of an agent except under a contingent fee arrangement.

Partially contingent fee agreements are permissible where provision is made for the payment of a substantial minimum fee, payable irrespective of the outcome of the proceedings, and whenever an attorney or agent shall enter a contract to represent a client before the Department on a wholly or partially contingent basis, he is required to file with the Committee a signed statement to that effect, containing the terms of the contract.

As hereinbefore noted, no such statement was filed by plaintiff, evidencing such a wholly or partially contingent contract, although plaintiff as a tax consultant was undoubtedly familiar with the Treasury Regulations.

It is not necessary to consider the enforceability of a contract entered in violation of the Treasury Regulations, or the effect of a failure to comply with the prescribed procedure, inasmuch as the evidence herein does not indicate that the parties originally contemplated either wholly or partially contingent fees. Reference is made to the Treasury Regulations only to reveal the policy of the law against contingent fees in these cases. Hence, such fees should not be implied or foisted upon clients by the courts.

Not only is plaintiff's claim violative of Treasury Regulations, but it cannot be countenanced under common law standards imposed upon persons exacting fees for services performed in a fiduciary capacity. All persons seeking to recover for services rendered have the duty of affirmatively proving the actual services performed, (Price v. Seator, 357 Ill. App. 248, 259) and the burden is on the fiduciary to show that the contract was entered fairly, and that his client was advised of

his rights. (Goranson v. Solomonson, 304 Ill. App. 80.)

The legal relationship between agents, such as plaintiff and clients, is comparable to that between attorney and client, and, in evaluating the propriety of fees, courts have emphasized the time involved, the intricacies of the questions presented, and the skill required. (City Nat. Bank & Trust Co. v. Sewell, 300 Ill. App. 582, 589.) Similar elements are stressed in the Treasury Regulations defining reasonable standards for fees for attorneys or agents presenting matters before the Department. Moreover, courts have criticized and rejected any practice of charging a higher rate of compensation for subsequent services. (Price v. Seator, supra; Miller v. Lloyd, 181 Ill. App. 230). With reference thereto, the court in the Seator case stated at p. 259: ". . .The subsequent services of respondent, exclusive of the preparation and institution of the suit, consisted in the examination of records, conferences to ascertain facts, and the examination of the law. There is nothing in the nature of these services to require compensation at a higher rate than that charged by respondent for consultations, and the charges made by respondent were at least an implied representation that future charges for similar services would be at a like rate."

Under the standards of conduct promulgated by the courts, an accountant representing a client should not be permitted to claim and enjoy the security of a fixed fee, fully compensating him for his services and predicated upon the number of hours of work and the difficulties of the case, and then, after the Treasury Department allows his client a substantial refund, to reassess the value of his services, and claim, instead, a percentage of the refund as though his fee had been predicated upon a contingent basis. That is in effect what plaintiff is endeavoring to do in this proceeding, and such conduct cannot be sanctioned by this court.

The testimony of the certified public accountant queried by the court as to the reasonableness of plaintiff's claim for fees in the total amount of \$667.80 is in no way determinative, not only because the witness testified with reference to his own charges, but because the witness failed to take cognizance of the material fact that the services were not performed on a contingent basis since plaintiff had already submitted a bill for his services, payable irrespective of the allowance of any refunds.

Under the foregoing analysis, therefore, the judgment of the trial court in the amount of \$432.80 in favor of plaintiff, for the alleged balance of his fee, was in error and should properly be reversed.

JUDGMENT REVERSED

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Abstract

General No. 10445

Agenda No. 2

In The
APPELLATE COURT OF ILLINOIS
Second District
February Term, A. D. 1951.

344 I.A. 1251

THOMAS JOHNSON, a minor, by Mary :
Johnson, his grandmother, and :
next friend, :

Plaintiff-Appellant, :

vs. :

HATTIE NEVENHOVEN, :

Defendant-Appellee. :

Appeal from the Circuit Court
Stephenson County

Dove, J. ✓

Thomas Johnson, a minor, by Mary Johnson, his grandmother and next friend, filed this suit in the Circuit Court of Stephenson County against Hattie Nevenhoven to recover for personal injuries which he sustained when, as a pedestrian, he was struck by defendant's automobile while he was crossing a street intersection in the City of Freeport. The case has been twice tried before a jury and in both instances verdicts of not guilty were returned. After overruling plaintiff's motion for a new trial following the second trial, the trial court rendered judgment in favor of the defendant and against the plaintiff in bar of the action and for costs and this appeal by plaintiff seeks to reverse that judgment.

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The errors relied upon for a reversal are that the verdict is against the manifest weight of the evidence and that the trial court erred in not striking the testimony of defendant's attorney.

The record shows that the plaintiff is six years of age and that the accident in which plaintiff sustained his injuries occurred on November 21, 1945, at the intersection of three streets, South Benton Avenue, East Iroquois Street and South Adams Avenue, in the City of Freeport. South Benton Avenue runs due north and south and it is intersected at right angles by East Iroquois Street. Running diagonally from southeast to northwest through this intersection is South Adams Avenue. South Adams Avenue is a through street with stop signs erected at its various intersections, including the one where the accident occurred. Plaintiff at the time of the accident was on his way from his home where he lived with his grandmother to attend school. He was in the first grade and was enrolled in the Henney School, which is only about two blocks from plaintiff's home. The accident occurred about 8:50 A. M. with school scheduled to start at 9 o'clock. At the time of the accident, a wet sticky snow was falling and there was about an inch of slush on the streets. Defendant was driving her husband's 1935 tudor Plymouth in a northerly direction on South Adams Avenue. The wet snow stuck to the windshield and the windows of defendant's car except for a spot which was cleared by the windshield wiper on the left side of her car. In order to reach his school, which was located on the east side of South Benton Avenue, plaintiff had to cross the intersection of South Benton Avenue and South Adams Avenue in a southerly direction. For four

or five years preceding the accident, the defendant had lived in the vicinity of the intersection in question and she was familiar with it and the adjoining neighborhood. With defendant at the time of the accident were her mother and two small children.

The evidence further discloses that plaintiff was about twelve to fifteen feet out into the South Adams Avenue intersection at the time he was hit by the defendant. There was a cross walk at this intersection for pedestrians to use but it was obscured by the snow and slush. The defendant testified that she never saw the plaintiff until he was three or four feet in front of her car, at which time he was in front of the right front fender of her car. She had not seen the boy leave the curb. Plaintiff was struck by the left front headlight of the car and thrown some twelve to fifteen feet out into South Adams Avenue, suffering a broken left leg. Defendant stopped her car within six feet after the impact. Defendant was driving fifteen miles an hour or less. Defendant testified that as she neared the intersection where the accident happened, she observed a parked or stopped car to her right near the northeast corner of the intersection, which car obstructed her view in the direction from which the plaintiff was approaching the intersection and that when she first saw the plaintiff he was running out from the other side of this stopped car diagonally across South Adams Avenue and directly in front of her car. She stated that she applied the brakes the instant she saw this six year old boy, but she could not stop her car before striking him. The plaintiff, ten years of age at the time of the second

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trial, testified that he saw defendant's car approaching from his left a short distance away and that he slipped on something and fell and that he was hit as he was attempting to regain his balance.

The foregoing, we believe, is a fair summary of the material evidence presented at the trial.

The plaintiff earnestly contends that the verdict of the jury is against the manifest weight of the evidence for the reason that the defendant's own testimony clearly shows that she was driving her automobile at the time and place in question without looking, or driving it without being able to look on account of the snow sticking to the right side of the windshield of her car. Whether the defendant was guilty of driving her automobile without looking, or whether she was guilty of driving it without being able to look was, of course, a question of fact for the jury to determine in the light of all of the facts and circumstances presented at the hearing. Such conduct of the defendant does not become a question of law unless it can be said that only one reasonable inference can be drawn from all of the evidence. *Gleason v. Cunningham*, 316 Ill. App. 286, 290. In *C & N. W. Ry. Co. v. Hansen*, 166 Ill., 623 at 629, the court said: "Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to the jury; but if the Court can say that but one reasonable inference can be drawn from the facts, the Court should act accordingly."

This case has twice been passed upon by two different juries and each jury has returned a verdict in favor of the defendant.

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In *Oliver v. Oliver*, 340 Ill. 445, 461, our Supreme Court said that courts are more reluctant to reverse a judgment based upon a verdict of a jury, where two juries have decided the issues the same way, than they are where there has been only one verdict. In *Goldstein v. Metropolitan Life Ins. Co.*, 324 Ill. App. 168, 174, the Court held that where two juries have passed upon the issues the same way it did not feel inclined to say that the verdicts were against the manifest weight of the evidence. In *Doerr v. City of Freeport*, 239 Ill. App. 560, 567, the court announced the rule that trial and appellate courts should be slow to set aside a verdict where two juries have found the issues the same way, and in *Williams v. Southern Ry. Co.*, 258 Ill. App. 34, 36, the court was of the opinion that where the same question has been submitted to two different juries, with the same result, that ordinarily the verdict would not be disturbed. Two juries have passed upon the issues presented in the instant case in the same way and we are not disposed to disturb the verdict as being against the manifest weight of the evidence.

It is next insisted that the court erred in not striking the testimony of defendant's attorney. Bert P. Snow represented the defendant at both trials of this cause and he also appears as the attorney of record in this court. Plaintiff had testified in his own behalf to the effect that he saw the car that hit him as it turned on South Adams Avenue from Float Street, which street was a short distance from the place of the accident. Mr. Snow then took the stand on behalf of his client and testified that he had

represented her in this suit for approximately three years and ten months and that three days after this accident he called at the home of Mary Johnson, plaintiff's grandmother, and interviewed the plaintiff, Tommie Johnson, who was then in bed, and that he asked him concerning the accident and how it happened and particularly if he saw the car that hit him and that Tommie told him that he never saw the car that hit him. On cross-examination it was brought out that this interview with Tommie and his grandmother lasted three quarters of an hour, that no signed statement was taken and that Tommie was in bed. Mr. Snow, the witness, then testified that he had refreshed his recollection by a statement he had prepared at the time of the interview in the presence of Mrs. Johnson. The witness was then asked on cross-examination: "Did you ever furnish Tommie with a copy of the statement that day?" to which the witness replied: "I prepared no statement from Tommie." Counsel for the plaintiff then said: "I move to strike all testimony then." The court ordered the testimony to stand and that concluded the cross-examination.

It is argued on this appeal that this testimony should have been stricken for the reason that it was immaterial as it makes no difference whether the plaintiff saw the defendant's car coming or whether he didn't, as under the law, because of his age, plaintiff could not be guilty of contributory negligence. (*Maskalis v. C. & W. I. R. R. Co.*, 318 Ill. 142, 149.) Counsel for the defendant, however, maintains that his testimony was offered in order to impeach the testimony of plaintiff as given on direct examination. In answer to this, plaintiff contends that if it were offered

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for that purpose, it constitutes an attempt to impeach the witness on an immaterial issue and for this reason such testimony was not proper. None of these objections were made at the time the testimony was offered. It is well settled that a specific ground of objection to evidence not made in the trial court cannot be urged for the first time on appeal. (Baltimore and O. S. W. R. Co. v. Brubaker, 217 Ill. 462; Gillespie v. Gillespie, 159 Ill. 84.) The testimony was competent and was received without objection and the trial court did not err in permitting the evidence to stand.

Counsel for Appellant further contends that the testimony of defendant's attorney was highly prejudicial to his cause before the jury because it is argued that the jury must have been convinced, as a result of such testimony, that the plaintiff was mistaken in his version of the accident or was untruthful. The giving of testimony by an attorney in cases in which he is employed is frequently criticized and condemned but such testimony is admissible and any objection thereto goes only to its credibility. (Bogart v. Brazze, 331 Ill. 160, 176.)

Our courts have repeatedly said that when an attorney himself, furnishes, by his own testimony, evidence to help himself succeed on the trial, such evidence will be closely scanned; that while it is not proper for an attorney, in a case he is conducting, to testify on ~~his own~~ ^{of his client,} behalf, he is not for that reason incompetent, and if he chooses to testify he may do so, but his testimony should be given little weight. (Wright v. Buchanan, 287 Ill. 468, 474; Wilkinson v. People, 226 Ill. 135; Grindle v. Grindle, 240 Ill. 143.)

An attorney should withdraw from his position as counsel in a case before testifying in behalf of his client, and, if necessary, he should ask the court to grant sufficient time to secure someone to take charge of the case. (Beninca v. Nardiello, 320 Ill. 181 at 185; Wiederhold v. Wiederhold, 305 Ill. 429 at 432-433; Eshelman v. Rawalt, 298 Ill. 192 at 196; Wright v. Buchanan, 287 Ill. 468 at 474; Ravenscroft v. Stull, 280 Ill. 406 at 412-413.)

Counsel for defendant justifies his testifying in this cause on the ground that he was taken completely by surprise at the plaintiff's testimony because plaintiff did not testify at the first trial, and that plaintiff's testimony was given at a time only an hour or two before final arguments were to be had and that it was too late for him then to withdraw and obtain other counsel. At the first trial neither the plaintiff or counsel for defendant testified and yet the jury returned a verdict for the defendant. The issue in both trials was whether or not defendant was guilty of the negligence charged in the operation of her automobile. This was a question of fact to be determined by the jury. The evidence offered on behalf of the parties was submitted to the jury under proper instructions and we are not warranted, upon the record, to disturb the findings of the jury.

The judgment of the Circuit Court of Stephenson County will therefore be affirmed.

Judgment affirmed.

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Abstract

Gen. No. 10457

Agenda No. 17

In The
APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1950

344 I.A. 125²

GEORGE FRANCIS WALLISER and)
ELSIE BAREIS WALLISER,)

Appellants,)

vs.)

Appeal from the
Circuit Court of
DuPage County.

NORTHERN TRUST COMPANY OF)
CHICAGO, ILLINOIS, as)
Trustee under the Last)
Will of WILLIAM WALLISER,)
Deceased, KATHRYN E. WIL-)
SON, MARY WILSON, a Minor,)
et al.,)

Appellees.)

Dove J.

On June 29, 1949 this court affirmed the judgment of the Circuit Court of DuPage County which had dismissed the complaint in this case. (Walliser v. Northern Trust Company, 338 Ill. App. 263.) Thereafter on October 26, 1949 the plaintiffs in that suit filed in the Circuit Court of DuPage County their motion or petition which recited that they, the plaintiffs, had, on February 18, 1944, employed Messrs. Weaver and Weaver, and on December 20, 1944, had employed George W. Thoma, as their attorneys for the purpose of having the Will of William Walliser construed, that thereafter their said attorneys spent 998 office hours in connection with their said employment, 30 hours in the Circuit

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Court of DuPage County, and 127 hours in the Appellate Court in connection with said employment, and that in addition Messrs. Weaver and Weaver advanced costs and expenses in connection with said litigation amounting to \$569.55.

The prayer of the petition was for an order allowing these attorneys a reasonable fee for their services they rendered in the Circuit and Appellate Courts and for an order directing that the funds advanced by Messrs. Weaver and Weaver be directed to be paid out of the trust estate now in the possession of the Northern Trust Company as trustee.

The respondent, Northern Trust Company, filed its motion to strike said petition and subsequently the court ordered this motion to stand as the answer of the Trust Company, the trustee, and the other respondents. At the hearing the attorneys testified as to the number of hours spent in connection with this litigation at their offices and in court, the reasonable value of their services and the payment of costs to the amount of \$569.55. At the conclusion of the hearing the chancellor found that plaintiffs' attorney fees and costs are not properly chargeable to the trust fund and denied the prayer of the petition. To reverse that order the plaintiffs appeal.

Counsel for appellants contend that this court in its opinion in Walliser v. Northern Trust Company, 338 Ill. App. 263, construed the Last Will of William Walliser, deceased, and that attorney fees and costs in procuring such construction are properly payable out of the corpus of the trust estate.

Counsel for appellees agree that attorney fees and costs are allowable when a construction of a will is necessary but insist that the complaint in the instant case sought to declare the trust created by the Will of William Walliser null and void and was not for a construction of that Will and quote from *Bartlett v. Mutual Benefit Life Insurance Co.*, 358 Ill. 452, at p. 457 where it is said: "The allowance of solicitor fees is only proper when the construction of a will is necessary. (*Schneller v. Schneller*, 356 Ill. 89; *McCormick v. Hall*, 337 id. 232; *Brunsey v. Brunsey*, 351 id. 414.) Where a bill is not filed to obtain a construction or direction relating to any provision of the will or to aid in any way in determining its effect but only to enforce a supposed interest of the complainant by a construction which would give him the property, the fees of the complainant's solicitor should not be allowed by the court. (*Power v. Power*, 296 Ill. 611.)"

When this case was before this court upon appeal from the decree of the chancellor dismissing the complaint, this court, in the very first sentence of its opinion, said: (*Wallister v. Northern Trust Co.*, 338 Ill. App. 263, at p. 265.) "Plaintiffs, George F. Walliser and Elsie B. Walliser, are appealing from a judgment of the Circuit Court of DuPage County dismissing their complaint to have declared null and void the trust created under the Will of William Walliser, whose sole heir-at-law is plaintiff, George F. Walliser." And in the concluding paragraph of the opinion, (pp. 274-5) we said: "It is the opinion of this court, upon a consideration of all the grounds presented by plaintiffs for declaring void the trust, and holding George F. Walliser to be the

sole heir-at-law, that the Circuit Court did not err in the dismissal of plaintiffs' complaint and that the judgment of the trial court should properly be affirmed."

This court also said that appellants' contention that the trust created by this Will was void on the ground that under clause four of the Will uncontrollable discretion was given to the trustee to invade the corpus of the trust was "without legal merit." (p. 269) And on page 272 of the opinion we said that "the trust contains neither uncertainties nor repugnancies" and in answer to the contention that the trust created by the testator violated the rule against perpetuities, we said: (p. 273) "there can be no violation of the rule against perpetuities in the vesting of the charitable interest." Had the attack upon the validity of this trust been successful the entire estate of William Walliser would have been distributed to one of the appellants here as intestate property.

Counsel for appellants cite, quote from and rely upon *Ingraham v. Ingraham*, 169 Ill. 432; *Dean v. The Northern Trust Co.*, 266 Ill. 205; *Norton v. Jordan*, 360 Ill. 419; *In re Estate of Reeve*, 393 Ill. 272; *McCormick v. Hall*, 337 Ill. 232 and several other cases, all to the effect that where a testator has expressed his intention in his will so ambiguously that it becomes necessary to prosecute a suit in order to obtain a construction of that will, the reasonable fees of the solicitors and costs of the litigation should be paid from the trust. Counsel for appellees find no fault with the holdings in these cases and this court would have no hesitancy

in following the principles of law announced in those cases were they applicable. The original complaint in this case was filed not to obtain a construction or direction relating to any provision of the Will of William Walliser but only to enforce, as counsel for appellees point out, a supposed interest of appellants by a construction that would give one of appellants the property freed from any trust.

In our opinion the order appealed from is supported by the authorities and that order is affirmed.

Order affirmed.

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Abstract

Gen. No. 10469

Agenda No. 11

In The
APPELLATE COURT OF ILLINOIS
Second District
February Term, A. D. 1951

344 I.A. 126

CARL CONARD,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	LaSalle County.
)	
AVIS M. CONARD,)	
)	
Defendant-Appellant.))	

Dove J.

Carl Conard filed his verified complaint for divorce on August 6, 1949, alleging that the parties were married on June 23, 1942 and charging that the defendant, Avis M. Conard had deserted the plaintiff, her husband, on September 20, 1945. The defendant answered admitting the residence and marriage as alleged but denied the desertion. The evidence was heard by the court and a decree was entered granting the plaintiff a divorce and the record is before us for review upon an appeal by the defendant who seeks a reversal of the decree on two grounds (1) that the plaintiff failed to prove wilful desertion without reasonable cause and (2) that the evidence discloses that the parties mutually agreed to the separation.

It appears from the record that the parties were married on June 23, 1942 and lived together as husband and wife in Ottawa until September 30, 1945; the husband was employed by the Standard Oil Company and the wife taught school near Rock Falls, Illinois. No children were born of the marriage nor were any adopted. During the period of the marriage prior to the separation the wife was at home in the summer months and for week ends only while away teaching school. She had her own car and the husband had his own car and also the use of a car which belonged to the company he worked for.

The defendant testified that she and her husband lived in the same house from the early part of 1945 until they separated in September of that year but did not co-habit; that in April 1945 her husband suggested a separation and that she go home to her parents. The plaintiff denied that he made this suggestion to his wife. In August 1945 the defendant accused her husband of being friendly with other women and he testified that she told him that she was not going to live with him any longer. The defendant testified that after she accused her husband of being friendly with other women, her husband, in the latter part of August, stated to her that she would not want to live with him and she testified, "I would have to separate from him after that night"; that they then discussed what to do with the apartment and the furniture and on September 30, 1945 she put her personal things in her car and he put his in his car and they left the apartment at the same time and he obtained a room in Ottawa and she went to Sterling and the parties have not lived together since that time.

After September 30, 1945 the plaintiff sent the defendant \$20 a month through 1948 or early 1949 and she testified that the plaintiff had given her a total of \$1490. At the time of the separation practically all of the furniture was taken by Mrs. Conard.

In 1949 the plaintiff testified that he talked to his wife about a divorce but his wife said she was not interested in and would not be benefited by a divorce.

Section 1 of the Divorce Act (Ill. Rev. Stat. 1949 Chap. 40 Section 1) provides that if either party to a marriage has wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year, it shall be lawful for the injured party to obtain a divorce. +

The defendant insists that the plaintiff did not establish by the evidence that she wilfully deserted plaintiff without reasonable cause as provided by statute. She admits the separation but contends she had cause therefor and bases her cause upon the alleged misconduct of the plaintiff with other women. The fact established by the evidence was that the husband did visit the apartment occupied by Miss Knauff one evening. He admitted this fact and explained he was there to look over the apartment seeking to rent it as Miss Knauff was leaving it and it was for rent. The evidence is that he was never in the apartment at any other time and he testified that he was never in Miss Knauff's company at any other time and had never had improper relations with any woman in his life. The record in this case fails to establish that the defendant had reasonable cause to leave the plaintiff.]

The defendant offered to prove by the defendant and other witnesses that the plaintiff was on a highway in the country with a woman not his wife, that he was out all night for four nights in July, and that during the summer of 1945 he came home with lipstick on his shirt. These offers were made to show circumstantial evidence of adultery and the adulterous disposition of the plaintiff. The plaintiff objected to these offers of proof on the ground that under the pleadings such evidence was incompetent, irrelevant and immaterial as the answer of the defendant simply denied the desertion. The court sustained the objections and the offers of proof were denied.

The law is settled that to show reasonable cause for living separate and apart the evidence must be such as would entitle the party guilty of abandoning the other to a divorce. Holmstedt v. Holmstedt, 383 Ill. 290, Fritz v. Fritz, 138 Ill. 436, Swan v. Swan, 331 Ill. App. 295. The evidence in this record is clearly insufficient to show plaintiff was guilty of adultery. The incidents stated in the offers of proof even if all were proved would not in our opinion be sufficient to entitle the defendant to a divorce on the ground of adultery, and would not justify her in leaving the defendant and refusing to thereafter resume her marital relations with him. (Carter v. Carter, 62 Ill. 439.)

The defendant next insists that the evidence shows that the parties mutually agreed to a separation. She testified that the plaintiff suggested in March or April 1945 in their apartment that they separate and that she go back home

to her parents in Sterling. She also testified that after they came back to the apartment in August 1945 and after she had told him that he was in another woman's apartment one evening, he made a statement that she would not want to live with him after this and they were going to have to separate. She replied that she would have to separate from him and that he said that he could not expect her to live with him after that. The plaintiff denied these several statements attributed to him by the defendant. The defendant further testified that the plaintiff asked her if she would like to keep the apartment and stated that if she wanted to keep it, he would leave, but if she wanted an apartment in Sterling nearer her work, he would pay for it. She told him that she would try to get an apartment in Sterling, because Ottawa was a long way from her work. She also testified that she told him she wanted him to take the bedroom furniture but he said he had bought it for her and she took it and at the time of the hearing it was in storage in Sterling.

The plaintiff testified that in August his wife accused him of being friendly with other women and that on one night in August he was in the apartment of Miss Knauff and that the defendant saw him come out of there and that it was shortly thereafter that his wife told him that she was not going to live with him any longer. He further testified that he first learned his wife was going to leave a week before the separation. Upon the hearing she testified that she and her husband separated September 30, 1945, and had not lived together since that time and that she was living near Tampico, Illinois; that she did not want a divorce

and in reply to her counsel's question: "Do you want to live with him"? replied: "If it was Carl Conard that I married or that I thought I married, I would certainly say yes, but not the way it turned out to be."

Lutticke v. Lutticke, 406 Ill. 181 was a suit by a husband against his wife for a divorce on the ground of desertion. It appeared in that case that the wife left their home to take care of her son's house because her son's wife was ill and in the hospital and later died. She subsequently resumed her former married name and never returned to live with her husband. The husband testified that he consented in a general way to her going away but for not longer than two months and while she was away part of their land was sold to the husband's brother and his wife asked for and received \$250.00, one-half of the proceeds of the sale of the property. In affirming a decree which awarded the husband a divorce the Supreme Court at page 186, said: "Separation by mutual consent does not constitute desertion, within the contemplation of the statute, (Floberg v. Floberg, 358 Ill. 626) but the Chancellor found that defendant wilfully deserted plaintiff and, consequently, the precise question presented for determination is whether the decree is contrary to the evidence. The evidence for plaintiff shows that defendant left with the announced intention of not returning, resumed her former married name and never made any effort to return to her husband. While the testimony as to defendant's intention is conflicting, the chancellor saw and heard the witnesses and his finding that defendant wilfully deserted her husband on May 29, 1949, not being contrary to the weight of the evidence, will not be disturbed. (Insoda v. Insoda, 400 Ill. 596)"

In the instant case there were only two witnesses, the plaintiff and the defendant. The defendant's testimony tended to show that the parties separated by mutual consent. ✓ She testified that her husband suggested separation in the spring of 1945. This he denied. She testified that when they returned to the apartment after his being in the other woman's apartment it was he who said that she would not live with him after that incident. He denied this and testified that his wife was the one who told him that she would not live with him any longer. Both parties testified with reference to leaving the apartment on the same day, the division of their belongings, the husband giving her the furniture, the amount paid by the husband to the wife and the payment of \$20.00 a month for four years, but he denied that the separation was at his suggestion. The plaintiff recognized that he had an obligation to support his wife, (Johnson v. Johnson, 313 Ill. App. 193, Elzas v. Elzas, 171 Ill. 632) and the making of these payments of \$20.00 per month for four years, the division of the bonds and the personal effects, or the fact that the plaintiff insisted that the defendant take the bedroom furniture as he had bought it for her, are not sufficient to establish that the finding of the Chancellor,)) that the separation was not by agreement, is contrary to the manifest weight of the evidence. The decree appealed from must therefore be affirmed.

Decree affirmed.

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Agenda No. 8

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344 I.A. 1 9

APPEAL FROM THE
CIRCUIT COURT OF
CARROLL COUNTY.

Appellant E. H. Gholson was adjudged guilty of criminal contempt by the Circuit Court of Carroll County and a fine of \$250.00 and a jail sentence of ten days was imposed. Appellant Clara Gholson was also found guilty of the same charge and fined \$250.00.

The petition for a rule to show cause alleged that on September 12, 1949, there was duly instituted in the Circuit

Court of Carroll County a criminal cause against the defendant, E. H. Gholson, and that said criminal cause was then pending and undetermined; that in said criminal cause the defendant, E. H. Gholson, was charged with violating "The Medical Practice Act of the State of Illinois"; that on the 21st day of November, 1949, the defendant, E. H. Gholson, was present in open court and attended by his counsel and said criminal cause was set for trial on the 12th of December, 1949; that a list of the names of the jurors drawn to hear said cause was delivered to the defendant; that thereafter and on December 8, 1949, the defendant, E. H. Gholson, wrongfully and unlawfully caused to be published in The Lanark Gazette and Thomson Review, both of which were public secular newspapers published and of general circulation in Carroll County, a certain advertisement, a copy of which was attached to said petition and made a part thereof; that members of the jury which were to hear the criminal cause against said defendant set for trial for December 12, 1949, were subscribers to said newspapers, or one of them, and did receive and read said advertisements and would be influenced by them in favor of the defendant; that on the 7th of December, 1949, the defendant, E. H. Gholson, caused a certain newspaper advertisement to be distributed at large in Carroll County through the United States Mails, a copy of said advertisement being also attached to the petition and made a part thereof; that some one or more of the members of the jury drawn to try the criminal cause against said defendant saw and read said advertisement and would be influenced by it in favor of the defendant, E. H. Gholson.

The petition then alleged that the defendants were husband and wife and that the defendant, E. H. Gholson, claims

to be a graduate of Palmer School of Chiropractic at Davenport, Iowa; that the defendants, after the cause had been set for trial and prior to the date of the trial, wrongfully organized and arranged for a motor caravan of 400 automobiles and 1200 people consisting of students and instructors of, and other persons connected or associated with, the Palmer School of Chiropractic, to travel from Davenport, Iowa, to Mt. Carroll, the County Seat of Carroll County, to attend the trial of said criminal cause on December 12, 1949; that on December 7, 1949, defendant, E. H. Gholson, acting by and through his wife and agent, the defendant, Clara Gholson, who was also acting in her own behalf, informed the Sheriff of Carroll County, the Chief of Police of Savanna, and the Sergeant of the Illinois State Police that said motor caravan of 400 automobiles and 1200 people would travel from Davenport, Iowa, to Mt. Carroll to attend said trial on December 12, 1949, and requested said officers to escort said caravan, or to provide an escort therefor, and to arrange for sufficient and convenient facilities for parking said motor caravan at or near said Court House; that the defendant, E. H. Gholson, on and about December 9, 1949, informed the Chief Deputy Sheriff of Carroll County that said motor caravan was coming and requested him to escort said caravan and to arrange convenient facilities for the parking of said motor caravan near the Carroll County Court House on December 12, 1949.

The petition then charges that the defendant, E. H. Gholson, caused said advertisements to be published and circulated and said caravan to be organized with the purpose, plan and intent

to wrongfully and unlawfully influence the panel of jurors selected to try the issue of his guilt or innocence in the criminal cause then pending against him. It is then alleged that on December 12, 1949, a motor caravan of 125 automobiles and 500 persons did travel from Davenport, Iowa, to the Court House at Mt. Carroll, Illinois, and said persons did enter the court room in said Court House where the trial was to be held and that said persons were present in the court room prior to the time of the convening of said court for said trial and that said persons occupied all the available seating facilities in said court room and occupied all of the aisle space and standing room space in the court room and the adjoining hallways and stairways.

The newspaper advertisements, attached to the petition, are as follows:

—
"Jerry Olson is a happy little boy, and his parents are even happier for their dream of a normal life for their son has at last been attained. The nine-year-old child of Mr. and Mrs. Alvin Olson, Savanna, is back in school and enjoying a normal boyhood after almost three years in the hospital.

—
"Jerry was stricken with polio in August, 1946. He spent the next two years and nine months in Deaconess hospital, Freeport, under constant medical care provided by the Carroll County Chapter of the National Foundation for Infantile Paralysis.

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2674 # —
"The little boy was released from the hospital in May of this year, partially paralyzed on his left side and wearing a brace. The polio foundation said they could not longer care for him there because of the expense of hospitalization. From the time he became ill until his release from the hospital, over \$9000 was spent on his medical treatment.

—
"Mr. and Mrs. Olson then took Jerry to Dr. E. H. Gholson, Savanna Chiropractor. Dr. Gholson took Jerry under his care and according to Mr. Olson, 'after the first adjustment of the spine, Jerry was able to move his left shoulder for the first time since his illness.'

—
"Now three months later, Jerry has discarded his brace. He has even begun to boast about the muscles in his left arm."

advertisement

The other, referred to was a reprint of an article published in The Chiropractic Review, which is an annual periodical published by The Chiropractic Association, and consisted of an autobiography of the defendant, ^{E. H.} Gholson, and ^{was} couched in laudatory language in ~~its~~ its references to the defendants and the chiropractic profession.

The defendants filed their separate verified answers to this petition. The defendant, E. H. Gholson, in his answer admitted that he was the defendant in the criminal cause referred to in the petition which on November 21, 1949, was set for trial on December 12, 1949, and that he was present in the court room on the day of the setting and admits that a jury list was given to him at that time. He further admitted in his answer that he had the newspaper articles published in The Lanark Gazette and the Thomson Review, as alleged, but denied that he knew or should have known that some one or more of the members of the jury drawn to hear the criminal cause against him would read said advertisements and be influenced by them. As to the allegation that some one or more of the jury did read said newspapers and did consider the advertisements of the defendant therein, he alleged that he had no knowledge, and could, therefore, neither admit nor deny such allegation; this defendant also admitted that he had the article published in The Chiropractic Review but denied all the other allegations of the petition pertaining to said advertisement except that he averred that he had no knowledge as to whether any member of the jury panel saw said advertisement and read the same. In his answer, defendant, E. H. Gholson, denied that he organized the motor caravan of persons associated with or connected with

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the Palmer School of Chiropractic to travel from Davenport, Iowa, to Mt. Carroll to attend his trial, and he also denied that he called the Sheriff of Carroll County, the Chief of Police of the City of Savanna, and the Illinois State Police to escort, or to provide an escort, for said caravan but admitted that he talked with the Deputy Sheriff of Carroll County and sought advice on how to obtain an escort for said caravan. He admitted that there were a number of people present in the court room on December 12, 1949, the day set for his trial, as alleged in the petition, but denied the other matters therein contained. In his answer he alleged that the newspaper articles and the reprint from The Chiropractic Review were all a part of his general advertising policy and were in no way connected with the criminal cause then pending against him, nor were they published with any intent or design to influence the outcome of said criminal proceeding.

The defendant, Clara Gholson, filed substantially the same answer as her husband except that she admitted that she did call the Sheriff of Carroll County, the Chief of Police of Savanna, and the Illinois State Police to try to arrange for a police escort of a group of people who indicated their intention to attend the trial of the criminal cause against her husband, the defendant, E. H. Gholson, but that said escort was desired for the purpose of preventing a traffic hazard on the highway.

It is the contention of appellants that under the authorities they purged themselves of the alleged contempt by their verified answers and the trial court erred in not so finding.

The judgment of the court was upon the pleadings and the personal observation of the court as to what transpired in

the court room on December 12, 1949. The trial court in rendering the judgment appealed from said: "I came into the court room at about twenty minutes after nine, anticipating a session of court at ten o'clock. I had no knowledge of any such gathering until I entered the court room door, from the rear of the bench. To state it very free from exaggeration, I will say that the allegation in the amendment to the petition that there were five hundred people coming from Iowa to this court, if they got into the court room, ~~xxxxxxxxxxxxxxxx~~ ~~xxxxxxxx~~ was a very modest estimate, because surely there were in this court room, in this old building, built in 1858, on the second floor and gallery, people in number at least double the number that had any right in the court room space and at the sides of the court room where counsel have a right to assemble. I went into the judge's chambers and attended to some matters there, and came into the court room to learn that the jurors were not in the court room. The jurors were here for the trial, but they were up on the third floor in the jury room. ~~...~~ I had in mind the safety of the jurors on the third floor of the building, and the fire hazard and the hazard of this old building, nearly a hundred years old, with a tremendous crowd in it, having observed from my seat on the bench, coming to and from the judge's chambers, that the hall and stairway were packed to capacity with people, apparently waiting to come into the court room ~~...~~ and in the course of the proceedings that morning there were things that evidently were amusing to the crowd, because on three different occasions it became necessary for me, in order to keep the crowd where they belonged, and in order to admonish them that there must not be the disturbance

and giggling and laughing and noise that there was from the audience in the court room. Whether it disturbed anyone else or not, it disturbed me, and I didn't like it, and I stated so to them quite emphatically. The laughter was at times detrimental to Mr. Smith's (the State's Attorney) contentions and not favorable to him.

From the matters before the court, in the petition, as amended, it quite satisfactory appears that the respondents not only knew of this unnatural interest of the citizens of Iowa, incident to the proceeding in this court, but that they participated actively in bringing that caravan about, and in bringing those people here. The answers show the knowledge of these respondents and that there was a jury trial set, and that both of the respondents knew of the proposed caravan, and it is fair for the court to conclude that they knew of the effect of a large number of people like that, the presence of those people upon the jurors, possibly and probably upon the court.

These respondents knew of the result of that large number of people coming into this court room and taking over control of all the space in the court room, and in the opinion of the court, it became the duty of these respondents, a duty to the court, upon their receiving notice of that proposed caravan to have requested those from whom they received the information and those in charge of the caravan to refrain from thus embarrassing the court in its orderly procedure and from overcrowding or taking over the space the court needed now I am stating these things from my own observation and my own feelings on the morning in question. I never, in my experience, have been quite as disturbed in connection with a

court proceeding as I was at the time of the incident and the acts that I have related in this record ~~XXXX~~✓

(1) Both the People and the defendants have treated this proceeding as an indirect or constructive contempt of court. In People v. Doss, 392 Ill. 307, at page 312, the court said: "In a case, as here, where a contempt proceeding is instituted to maintain the court's authority and to uphold the administration of justice, and where the acts charged were not committed in the presence of the court, a sworn answer denying the alleged wrongful acts is conclusive, extrinsic evidence may not be received to impeach it, and the defendant is entitled to his discharge. (People v. Whitlow, 357 Ill. 34; People v. McDonald, 314 id. 548; People v. Seymour, 272 id. 295). If the answer is false, the remedy is by indictment for perjury. (People v. McLaughlin, 334 Ill. 354.) On the other hand, if the answer admits the material facts charged to be true and the facts constitute a contempt of court, punishment is imposed. (People v. Parker, 374 Ill. 524; People v. Seymour, supra.)

In either event, the offender is tried solely upon his answer.✓ For further explanation of the difference between a direct and an indirect contempt of court, see People v. Harrison, 403 Ill. 320, where it is pointed out that an indirect contempt consists of matters taking place outside of the presence of the court and concerning which the court does not have full personal knowledge of every element necessary to constitute the contempt.

(2) It was proper for the court to take into consideration the matters within his personal observation and knowledge with respect to what occurred in his court room on December 12, 1949, the day the criminal cause against the defendant, E. H. Gholson,

was set for trial insofar as his observations and knowledge concerned the matters referred to in the pleadings. In The People v. Hille, 192 Ill. App. 109, at page 148, the court said: "Where the contempt charged is criminal in its nature, as in this case, the contemnor may answer the charge under oath either orally or in writing, as he chooses, and his answer must be accepted as true except in so far as it may contradict the records of the court, or the facts that transpired in the presence of the court, and if by his answer he purges himself of the contempt charged against him, he must be acquitted thereof."

[3] It is apparent from this record that if there has been any contempt of court by the defendants, it lies in their having published the advertisements attached to the petition and the presence of the caravan in court on December 12, 1949, with their knowledge and acquiescence. It is insisted by counsel for appellants that since the advertisements in question do not specifically refer to the criminal cause then pending against the defendant, E. H. Sholson, they are not contemptuous and, further, that there is no showing that any member of the jury called to hear said criminal cause, or the court, read said advertisements. Such, however, is not the test of a contemptuous publication. In Toledo Newspaper Co. v. United States, 247 U.S. 402, 418, 421, 62 L. Ed. 1186, 1193, 1194, 38 Sup. Ct. Rep. 560, the newspaper company was adjudged guilty of contempt of court by publishing in the city where the court was sitting articles concerning a pending equity case. In that case it was maintained that it was not alleged, proved, or found that any of the publications was brought into the court building or read by the judge,



and, therefore, he lacked power to punish for contempt.

Replying to this contention, the court said: "Clarified by the matters expounded and the rule made in the Marshall Case (Marshall v. Gordon, 243 U. S. 521, 61 L. ed. 881, 1917F, 279, 37 Sup. Ct. Rep. 448, Ann. Cas. 1913*, 371), there can be no doubt that the provision (§ 262) conferred no power not already granted and imposed no limitations not already existing . . . The provision therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty, ^{as} a conclusion which necessarily sustains the view of the statute taken by the courts below. . . .

"True, it is urged that, although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated in a daily paper having large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind

of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts." See also, Sinclair v. United States, 279 United States 749, 73 Law Ed. 938, 49 Sup. Ct. Rep. 471.

In Telegram Newspaper Company v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L.R.A. 159, the newspaper was adjudged guilty of contempt of court for a certain publication which it made concerning a petition filed by one Loring against the Town of Holden for the assessment of damages against said town for the taking of his property. The portion of the article published, which the court found was calculated to obstruct justice and prevent a fair trial was as follows: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law." The court found that the articles were not defamatory to the presiding justice of the court, or the jurors before whom the cause referred to was being tried,

or the parties to the cause, but since the matters contained in the publication would not have been admissible in evidence -- that is the offer of a compromise and settlement -- the court was of the opinion that said publication tended to obstruct justice. In that case the court said: "The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on the evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the courtroom, and not in the presence of the parties, which may be false, and, even if they are true, are not in law admissible in evidence. We cannot say that it appears that the superior court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court; and it was for that court to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial, and was not introduced at the trial; and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the court and jury in the determination of the cause."

[455] It has been held that it is not essential to the power of the court to punish for contempt in the publication of an article that the publication should actually have obstructed the

administration of justice in a particular case but that it is sufficient if it was the object and tendency of the publication to produce such a result. (People v. Olson, 64 Ill. 195.)

In the instant case we think the natural tendency of the advertisements admittedly published by the defendants was to prevent the people from having a fair trial of the issues involved in the criminal cause against the defendant, E. H. Shelton. This is especially true as to newspaper articles, inasmuch as these advertisements were published just four days prior to the date set for the hearing of the criminal cause. Even assuming that those advertisements were a part of his general advertising budget, as he contends, we believe that it was his duty, under the circumstances as shown by this record, to have refrained from such advertising until after the criminal matter against him had been tried.

[6] This leaves the matter of the caravan for disposition. The answers of appellants disclaim any part in the organization of the caravan, but the answers of both admit knowledge thereof and overt acts in the obtaining of help to expedite the caravan and to obtain parking facilities for it when it arrived at the court house. Instead of doing things that might expedite the caravan, it was their plain duty to do whatever they could to suppress it. The defendant, E. H. Shelton, was present in the court room on November 21, 1949, when the criminal cause was set for trial and he thus knew of the limited physical facilities of the court house and courtroom. The defendants contend that they had no power to keep away those who were interested in attending the trial and, further, that these persons had a

lawful right to attend the trial, as a trial is a public hearing. No one disputes the assertion that a trial is a public matter; however, this caravan was not a spontaneous gathering of persons interested in the defendant, but rather, in our opinion, a carefully planned assemblage of persons seeking to influence the orderly processes of law and the administration of justice. The failure of the defendants in not taking every means at their disposal to disapprove of it and their affirmative acts in connection therewith, under the circumstances appearing in this record, constitute a contempt of court.

The judgments of the circuit court are correct and they are affirmed.

Judgments affirmed.

✓ *deposited*

Ind. Ex. 12-1

344 Ill App 209¹

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a term of the Appellate Court, begun and held at
Ottawa, on Tuesday, the 3d day of October, in the year of
our Lord one thousand nine hundred and fifty, within and for
the Second District of the State of Illinois:

Present -- Honorable FRED G. WOLFE, Presiding Justice

Honorable GEORGE W. BRISTOW, Justice

Honorable FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

EDWARD T. RYAN, Sheriff

BE IT REMEMBERED, that afterwards, to-wit:

On OCT 20 1950 The Opinion of the Court was
filed in the Clerk's Office of said Court, in the words and
figures following, viz:

Gen. No. 10408

In the Appellate Court of Illinois

Second District

May Term, A. D. 1950

Betty Olinger,)	
	)	Appeal from Circuit Court of
Plaintiff-Appellant,)	
	)	Rock Island County
vs.)	
	)	Honorable Leonard E. Telleen,
John H. Ehrberg,)	
	)	Judge Presiding.
Defendant-Appellee.)	

BRISTOW, J:

This appeal reaches this court as a result of plaintiff's failure to convince a jury that she was entitled to damages in a personal injury action in the Circuit Court of Rock Island County.

The plaintiff, Betty Olinger, alleged in her complaint that in November, 1948, the defendant, John H. Ehrberg, was driving an automobile into the intersection of Fifteenth Street and Third Avenue in the City of Rock Island, and negligently caused a collision with a motorcycle upon which she was riding; that she was in the exercise of due care and caution, and that as a result thereof she was painfully and permanently injured.

A reading of the record discloses that there is not very much dispute as to what actually happened at the time in question. The accident took place on November 7, 1948, at five P. M., when it was just becoming dusk. The plaintiff was riding as a passenger on a motorcycle which was being operated by Donald Aten. The plaintiff and Donald had been riding around the Tri-Cities for several hours, and just prior to the accident were traveling west on Third Avenue, approaching its intersection with Fifteenth Street. There was testimony that at the time of the occurrence, they were traveling at the rate of twenty (20) miles per hour on the right lane of traffic. The defendant and

1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order, and the addresses are given in full. The list is as follows:

2. The second part of the document is a list of the names of the members of the committee who have been elected to the office of chairman and vice-chairman. The names are listed in alphabetical order, and the offices are given in full. The list is as follows:

his wife were traveling east on Third Avenue, and because of the red signal light, they were forced to stop as they reached Fifteenth Street. As the defendant was awaiting the change of the light from red to green, he noticed two women going across the street in front of him. After they had passed, he undertook to make a left turn, and as he passed into the north lane, his wife exclaimed, "John, there is a motorcycle." Whereupon he immediately came to a stop and the motorcycle collided with his car. He had not seen the motorcycle theretofore, but said he was watching the two women go by in front of his car. At the time the defendant turned left to the north of the center line of Third Avenue, the motorcycle had already entered the intersection and was to the west of the middle of the intersection when it collided with defendant's car. There was testimony that the motorcycle was probably traveling faster than twenty miles per hour. A policeman testified that it appeared to him that the motorcycle increased its speed some as it was approaching the intersection, and was apparently making an effort to cross the intersection before the lights turned from green to red. The physical facts would not indicate that he was driving at a high rate of speed, but that he unquestionably was driving at a speed that was in excess of the statutory rate for that particular locality, namely, fifteen miles per hour. The plaintiff testified as they entered the intersection she warned the driver of the motorcycle of the presence of the defendant's car which had just turned in front of them.

The driver of the motorvehicle turning left into an intersection shall yield the right of way to any vehicle approaching from the opposite direction which is in the intersection or so close thereto as to constitute an immediate hazard. (Chap. 95 $\frac{1}{2}$, Sec. 166, Ill. Rev. Statutes). The evidence clearly shows that the defendant violated this traffic regulation, and that by



so doing, was the proximate cause of the accident in question. A jury, conceivably, would be justified in concluding that the driver of the motorcycle was proceeding across the intersection faster than was reasonable and proper under all the circumstances. We are of the opinion that the record fails to justify the finding by the jury that the plaintiff failed to exercise ordinary care for her own safety at the time of the accident. The plaintiff, a guest of the driver of the motorcycle, could possibly have done no more than she did, namely, warn the driver of the impending danger.

The negligence, if any, of the driver of the motorcycle is not imputable to the plaintiff. Yet, the court gave this instruction:

"You are instructed that the law placed upon all persons the duty of exercising care to avoid injury, and even though the jury should believe from the evidence that the plaintiff Betty Olinger was injured thereby, if the evidence shows also that her injuries could have been avoided by the exercise of reasonable care by said plaintiff and the driver of the motorcycle and they they did not exercise such care, you should find the defendant John Ohrberg, not guilty as to her claim". This instruction tells the jury that the plaintiff cannot recover if the driver of the motorcycle did not exercise reasonable care. This is not the law. Thomas v. Buchanan, 357 Ill. 270. The jury ^{was} incorrectly informed of the law on an important and vital phase of the case. This error could not be cured by another instruction in the series that does correctly state the law. Hanson v. Trust Company of Chicago, 380 Ill. 194; Dees v. Moore, 335 Ill. App. 318.

The entire brief of the appellant is devoted to an attack upon the series of instructions given by the appellee. Most of



the criticisms have merit. Appellee's brief consists mainly of a counter-attack upon the series of instructions given for the plaintiff. Many of these objections are justified. It would unduly extend this opinion to give a detailed review of all the questions raised on the subject.

The plaintiff presents a claim for damages wherein she might reasonably anticipate a favorable result. She was entitled to have the jury accurately instructed as to the law. This was not done.

Reversed and Remanded.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of April,

in the year of our Lord one thousand nine hundred and sixty - one -

Paul V. Wunder
Clerk of the Appellate Court.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1951

344 I.A. 29²

WILLIAM PETROKAS,
Plaintiff-Appellant,
vs.
ATLAS FURNITURE COMPANY, INC.,
Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY

Dove, J.

In a trial before a jury, the plaintiff, William Petrokas, obtained a verdict against the defendant, Atlas Furniture Company, Inc., in the sum of \$7500. Judgment was entered in favor of the plaintiff and against the defendant on this verdict. Thereafter the defendant filed its motions for judgment notwithstanding the verdict and for a new trial. These motions were sustained and the judgment previously entered in favor of the plaintiff was vacated and set aside and judgment was entered in favor of the defendant and against the plaintiff for costs of suit. The motion of the defendant for a new trial was likewise granted. This appeal by the

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6. [Click the button](#) to start the process.
7. [Wait for the completion](#) of the process.
8. [Disconnect the device](#) from the computer.
9. [Restart the device](#) to apply the changes.
10. [Check the status](#) of the device.

$$\frac{d\mathbf{r}}{dt} = \mathbf{v} = \frac{1}{m} \nabla \mathbf{p} \quad \text{and} \quad \frac{d\mathbf{p}}{dt} = \mathbf{F} = -\nabla \mathbf{V} \quad (1)$$

plaintiff challenges the correctness of the rulings of the trial court in granting these motions and seeks a reversal of the judgment of the trial court.

By his amended complaint, plaintiff alleged that the defendant was the owner and operator of a furniture factory in the City of Rockford; that the factory building which it possessed was adjacent to a public sidewalk and public terrace, which public terrace lay between the public sidewalk and the curbing on the north side of Caroline Street in the City of Rockford; that the plaintiff slipped and fell on some ice which was covered with a light snow on the terrace between the sidewalk and the curbing in front of defendant's factory; that the defendant wrongfully and negligently attached and maintained at the southeast corner of its factory building at the time of the accident and for many years prior thereto a downspout six or seven inches in diameter, which downspout discharged water from the roof of the factory building in great quantities onto the public sidewalk and public terrace which was immediately adjacent to the factory building; that the maintenance by the defendant of this downspout was contrary to and in violation of a plumbing ordinance of the City of Rockford, which ordinance is as follows: "No rain water from roofs or other rain water drainage of premises shall discharge upon any public sidewalk"; that on January 19, 1948, and for a long time prior thereto, water from said downspout ran onto the public sidewalk and terrace and froze, and the defendant wrongfully permitted the water so frozen into ice to remain on the

sidewalk and terrace adjacent to its building; that on the day of the accident, January 19, 1948, a light snow covered the ice on the terrace and that about noon on said day the plaintiff came out of the door of the factory of the defendant (he being an employee of the defendant) and walked across the public terrace and that by reason of the negligence of the defendant in maintaining said downspout on its factory building and in allowing said water to gather and freeze on the terrace, he was caused to slip and fall upon the ice, and as a result of said fall, he suffered a broken left knee as well as other injuries.

The defendant answered the complaint and denied that it was guilty of any negligence in maintaining the downspout on its factory building. Upon the trial of the issues made by the pleadings two special interrogatories were submitted to the jury by the court at the request of the defendant. The first of these interrogatories was: "Did the plaintiff proximately contribute to bring about the accident and injury in question through his failure, if any, to use that degree of care and caution which an ordinarily careful and prudent person would use, under the same or similar circumstances?" To this interrogatory the jury answered, "No." The second interrogatory was: "Was the defendant, Atlas Furniture Company, Inc., guilty of negligence as charged in the plaintiff's complaint which was the proximate cause of the accident and injury in question?" The jury's answer to this interrogatory was "Yes."

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The plaintiff testified that he was born in Lithuania, was 56 years of age and came to this country in 1909; that he started working for the defendant in June of 1932 and had worked for the defendant from 1932 until the time of the accident; that his home was 28 blocks from the defendant's factory; that he walked to work nearly every morning prior to the accident, and that on the day of the accident he had walked from his home to the defendant's factory and had worked all forenoon; that it was his custom at noon to go across the street to a small lunch room located there to buy milk to drink along with his lunch; that on the day in question he went through the outside door of the factory and across the street to the lunch room where he purchased a pint of milk and then started back across the street ^{in order} ~~soon~~ to eat his dinner in the shop; that as he was walking across the terrace on his way back from buying the pint of milk, he fell on the west side of the shoulder of the terrace; that the terrace at the point where he fell was covered with ice; that it had snowed in the early morning of January 19th and this snow covered the ground with a thin coat, probably about a half inch in depth; that the ice where he fell was covered with this coating of snow; that after he had fallen, one of his co-workers and two other men from the shop came to the place where he was lying on the ground and helped him to get up, and a little later a Mr. Wiber and a Mr. Casper, who were officers of the defendant, came out to where he fell and then somebody called the ambulance, and he was taken to the hospital; that his left knee

was broken in six places, and that he remained in the hospital eleven weeks; that there was a downspout at the southeast corner of the factory building some six or seven inches in diameter and that it had been there for several years before the accident; that he had seen water running out of said downspout and onto the terrace on several occasions after a rain; that sometimes there was as much as three or four inches of water lying on the sidewalk after a rain and that it would cause persons using said sidewalk to get their feet wet; that the water drained out of the downspout at the southeast corner of the building and proceeded to run in a southerly and westerly direction toward the spot where he fell on the terrace; that he had frequently seen water on the sidewalk and on the terrace after a snow had melted; that on the day of the accident there was not any ice all over the street, but there was a lot of ice on the terrace in front of the factory door out of which he walked to go across^{to} the dairy; that the ice didn't get on the terrace south of the sidewalk at the place where he fell that morning from any other cause than the water running down through the downspout off the factory roof; that the ice was in front of the door and it was covered up with snow, and there was ice under the snow on the terrace where he slipped and fell.

Florian Amelung testified on behalf of the plaintiff that he was an employee of the defendant and was working at the factory of the defendant on the day of the accident; that at noon on the day in question he went across the street to the

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down through the car; that it was bent in the middle of the car;
was in front of the car; that it was bent in the middle of the car;
there was no water in the car; that it was bent in the middle of the car;
and fell.

Thomas was bent in the middle of the car;
that he was bent in the middle of the car;
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at the end of the car; that it was bent in the middle of the car;

dairy to get a bottle of milk; that on his way back from obtaining his bottle of milk, he saw the plaintiff lying on the terrace between the sidewalk and the street; that there was a telephone service pole located on said terrace ^{and} that the plaintiff was lying just a few feet west of the telephone pole; that there was a light snow covering the ground that day; that the snow covered the ground so completely that you could not see what was underneath the snow; that he heard Mr. Wiberg, an officer of the defendant, tell Henry Fielder, an employee of defendant, to spread some ashes around on the terrace and on the sidewalk at and near the point where the defendant fell; that during the time he had been working for the defendant, after a rain he had seen the ground around the downspout completely soaked; that during the winter before January 19, 1948, he had seen quite a bit of water and melted snow around the downspout and the sidewalk and terrace adjacent thereto; that on January 19, 1948, the terrace where the plaintiff fell was a glare of ice; that this glare of ice was disclosed only after the snow was brushed off; that he himself slipped on the ice on the terrace while he was helping the plaintiff get up after he fell.

George Larson testified on behalf of the plaintiff that he was an employee of defendant and had been since 1935; that he was working for the defendant on the day of the accident; that prior to the date of the accident he had seen water go over the terrace from the downspout from and following a thaw; that on the day of the accident the ground was frozen and there was a thin coat of snow on the terrace and in front of the factory door; that it was fresh snow which had fallen during the early

morning hours of that day.

The County Surveyor of Winnebago County, George E. Schroeder, also testified on behalf of plaintiff. He testified that he took measurements and some levels at the defendant's factory. He testified that the ground sloped away from the southeast corner of defendant's factory building where the downspout was located toward Madison Street in a westerly direction; that the defendant's building is a three-story cement covered building approximately 88 feet long facing on Caroline Street, which street runs east and west along said defendant's building; that there was a concrete sidewalk in front of the building running in an east and west direction, which said sidewalk was about four and a half feet wide; that from the southeast corner of defendant's factory building to Madison Street, some 88 feet away, there was a drop of approximately two feet, and that from said southeast corner to the curb opposite the door out of which the plaintiff walked just prior to the accident there was a drop of four and three-fourths inches; that water coming out of the downspout because of the lay of the land flowed in a southwesterly direction toward the spot where plaintiff fell.

Frank W. Knowlton, weather observer in the territory of Rockford, likewise testified on behalf of the plaintiff. He testified that there was a four and a half inch snow in the City of Rockford on January 4, 1948; that on January 3, the high temperature was 33°; on January 4, the high temperature was 36°; on January 5, it was 36°; on January 6, it was 35°;

on January 7, it was 40°; on January 8, it was 41°; on January 9, it was 38°; on January 10, it was 35°; on January 11, it was 37°; that there was a trace of snow on January 11th and a high temperature on January 12 of 37°; that two inches of snow fell the night before January 15, which snow started to fall at 11:20 P.M.; that from January 15 until January 19, at about twelve o'clock noon, there was not a thawing temperature; that there was a half inch of snow on the 18th, which half inch of snow on the 18th started at 10:50 P.M. and ended at 9:00 o'clock the next morning; that snow melts at a temperature of 31° - 32°; that where the sun shines directly on the snow it melts much more quickly than when the sun does not shine on it; that there was only one chance that the ice that was formed on January 15 by the thawing of the snow that fell in the late evening of January 14 and the early morning of January 15 would have had ~~a chance~~ to thaw prior to January 19 at 12:00 o'clock noon, and that is by the sun beating down on the snow; that after the four and a half inches of snow on January 1, there were approximately nine days in which there were thawing temperatures before January 19th; that the two-inch snow that fell on the 14th and 15th was "a little damp."

It was stipulated that the defendant's building was approximately 65 feet by 80 feet and had a roof area of about 5200 square feet; that the roof of the building sloped from west to east; that the water on the building roof drains into one eaves trough, which runs the whole width of the building and on the east side thereof, and that the water collected in

the eaves trough in the building is discharged to the ground by one drain pipe which is about six inches in diameter and which is located at the extreme southeast corner of the building and which drain pipe extends from the roof line to within one foot of the sidewalk.

The proof shows that the defendant maintained a six inch downspout at the southeast corner of his building and that this downspout drained the entire 5200 square feet which comprised the roof of the factory; that the natural drainage from the downspout was to the south and southwest; that between the first of January and the date of the accident, more than six inches of snow had fallen; that during this period of time there were several days when the temperature was above freezing; that plaintiff and other witnesses had seen water being discharged from the downspout during this period of time and which, in the natural course of events, had to flow across the sidewalk and onto the terrace; that snow melts at a temperature of about 31°, and, of course, where the sun shines directly upon it, it will melt sooner than it would if it were in the shade. It is a reasonable inference that some of the water that drained from the downspout and ran across the sidewalk and onto the terrace, under the temperatures prevailing during the days in question, soaked into the ground and that some of this water collected on the terrace and froze and thus formed ice. It is undisputed that the plaintiff slipped on some ice and fell. The controversy is as to what caused the ice upon which he slipped and fell. From our analysis of

this testimony, it appears to us that there is ample evidence in this record to justify the jury in concluding that the ice upon which the plaintiff fell was formed from water which had drained from defendant's building through the downspout and onto the terrace to the spot where plaintiff fell and that it was concealed by the light snow that fell the evening before and the morning of the day on which the accident occurred.

The defendant insists that there was a general icy condition throughout the City of Rockford on January 19 and this general iciness created the condition which caused plaintiff to fall, and the defendant is therefore relieved of liability. The evidence in the record does not support this position. Plaintiff had walked the 28 blocks from his home to defendant's factory that morning, and there is no testimony that he encountered any unusual slipperiness on his way to work, nor does the testimony indicate that anyone had any difficulty in walking upon the snow-covered ground at any point other than where the plaintiff fell. From the evidence found in this record, we are of the opinion the trial court erred in sustaining defendant's motion for judgment notwithstanding the verdict.

In support of defendant's motion for a new trial, it is insisted that the verdict of the jury is contrary to the weight of the evidence. We do not think so. We have set forth the evidence in support of the allegations of the complaint and we have studied the testimony offered by the defendant at the hearing and, from our consideration of all of the evidence, we are clearly of the opinion that the verdict of the jury is not

contrary to the manifest weight of the evidence.

The defendant also asserts that the plaintiff was guilty of contributory negligence as a matter of law which bars him from a recovery in this case. Counsel insist that the evidence discloses that the plaintiff rushed out of the defendant's factory building the instant the noon whistle blew and ran across the snow covered sidewalk and terrace to the dairy on the other side of the street, and after purchasing a pint of milk, then rushed back toward the door of the factory building where he was to re-enter and eat his lunch. From our examination of the evidence, we do not find that this assertion is sustained. The evidence shows that the plaintiff walked across the street in the ordinary normal manner of walking and does not show that he rushed, or ran, as defendant contends.

Lastly, the defendant argues that the maintenance of the downspout and the discharge of water or melted snow through it was not the proximate cause of the injury to the plaintiff and insists that the icy condition caused by the water and melted snow discharged through the downspout was superseded by the half-inch snow which the evidence discloses fell the night before and the morning of the accident. It is not necessary that the jury be able to determine whether the plaintiff slipped on the snow-covered ice solely because of the maintenance by the defendant of the downspout, or from a combination of water draining from the downspout and forming into ice and being concealed by snow. The general principle of law which governs such a situation is that if an intervening cause might reasonably have

been foreseen by the wrongdoer, his negligence is considered the proximate cause of the injury and he is held liable notwithstanding an intervening cause. *Carterville v. Cook*, 129 Ill. 152; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Chicago & N. W. Ry. Co. v. Smith Hoag*, 90 Ill. 339; 38 Am. Jur. 734. That water or melted snow ~~xxxxxxxxxxxx~~ which drained from the downspout at the corner of the defendant's factory building and ran onto the sidewalk and terrace adjoining the building in the winter time would freeze and that there might be a snow fall at any time during the winter months, which snow fall would cover up and conceal any ice which had formed on the terrace seems to us clearly foreseeable. Moreover, the maintenance of the downspout in violation of the plumbing ordinance of the City of Rockford was wrong in the beginning and when the original wrongful act itself was a violation of some statute or ordinance, this original wrongful act cannot be considered too remote, even, if subsequent to the original wrongful act, an intervening new cause asserts itself. *L. Wolff Mfg. Co. v. David J. Wilson*, 152 Ill. 9. The plaintiff's injury here was a natural consequence of the carelessness of the defendant in the location and maintenance of its downspout and could and should have been foreseen by any reasonable person, and, such being true, the defendant's liability is plain. *Pullman Palace Car Co. v. Laack*, supra; *Elsie Graham v. City of Chicago*, 260 Ill. App. 590. There was no sufficient intervening cause to relieve the defendant of its liability. The maintenance of the downspout by the defendant under the circumstances disclosed by this record was the proximate cause of the injury suffered by the plaintiff. Such being true, liability must attach.

We are, therefore, of the opinion that the trial court erred in granting the defendant's motion for new trial.

The judgment of the Circuit Court of Winnebago County is reversed and this cause is remanded to that court with directions to overrule the motion of the defendant for judgment notwithstanding the verdict and to deny the motion of the defendant for a new trial and to enter an order re-instating the judgment in favor of the plaintiff and against the defendant in the sum of \$7500.00 and costs as originally entered upon the verdict of the jury.

Reversed and remanded with directions.

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- Abstract

Agenda No. 26.

344 I.A. 20

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SECOND DISTRICT.

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FEBRUARY TERM, A. D. 1951.

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. Sidney L.
Ulrich,

Petitioner-Appellant,

vs.

BOARD OF TRUSTEES OF THE
FIREMEN'S PENSION FUND
OF THE CITY OF PEORIA,
et al.,

Respondents-Appellees.

Appeal from the
Circuit Court
of
Peoria County.

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Dove J.

On September 29, 1949 a Complaint was filed in the Circuit Court of Peoria County, praying that a Writ of Mandamus issue, directing the Trustees of the Firemen's Pension Fund of the City of Peoria to retire relator from the Fire Department and pay him a pension. An Answer and Reply were filed and a hearing had before the Court, resulting in an Order finding the issues for the Respondents and denying relator the relief sought. To reverse this Order relator appeals.

The Complaint alleged that the relator, Sidney L. Ulrich, had been in the service of the Peoria Fire Department continuously since 1931; that he was a fireman within the meaning of the Firemen's Pension Law of Illinois and that continuously since July 1, 1945 he had been the Fire Marshal of the Department at a salary of \$400.00 per month; that on June 15, 1949 relator filed with the Pension Board his application for a pension, stating that he had become physically and permanently disabled by reason of a heart condition so as to render it necessary that he be retired from service. He attached to the petition a letter of Dr. Parker who was the regular examining physician of the Pension Board stating that he had examined Ulrich on three occasions in the preceding month; that he found that Ulrich was suffering from arteriosclerotic heart disease and in the doctor's opinion was physically and permanently disabled so as to render necessary his retirement from service. The Complaint further alleged that at a regular meeting of the Pension Board held on June 16, 1949 a motion was adopted that Ulrich be sent to Dr. Durkin for an examination; that Dr. Durkin made a report in which he stated that the relator was quite obese, that

there was no evidence of structural heart disease, that the history of chest pain precipitated by exertion and relieved by rest and nitroglycerin is characteristic of angina pectoris and that the absence of organic findings does not rule out this diagnosis. It is then alleged that on June 20, 1949 the Pension Board denied, without a hearing, the application of relator for a pension.

The complaint further alleged that this action of the Board was later rescinded and that a hearing was held on July 21, 1949; that at this hearing Drs. Parker, Durkin and Walsh all testified that relator was suffering from a disease or condition of the heart known as angina pectoris or arteriosclerotic heart disease and that he was permanently and physically disabled from performing his duty as Fire Marshal or any other position in the Fire Department; that all the evidence proved conclusively that the relator was permanently physically disabled so as to render necessary his retirement; that there was no evidence to the contrary and that it became the duty of the Board and its members to retire relator and order the payment of his pension to him.

It was further alleged that six members of the Pension Board, the Mayor, Corporation Counsel and members of the Board of Fire and Police Commissioners conspired to deprive appellant of his rights under the pension law and committed certain overt acts which rendered them unfit and unable to exercise discretion or perform the duties entrusted to them; that the right of relator to retire and receive a pension is positive and clear under the law and the refusal of respondents to retire relator and pay him his pension is arbitrary, unreasonable and unjust.

The answer admitted some of the allegations of the complaint and denied others. It affirmatively alleged that the transcript of the hearing before the Board showed beyond doubt that

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the relator was not permanently physically disabled. The answer also denied any conspiracy and affirmatively alleged that the decision of respondents was the only possible one under the evidence.

The evidence established the several allegations of the complaint with reference to the service of the relator in the Fire Department and the meetings of the Board as alleged in the Complaint. It also appears from the record that at the hearing held by the Board on July 21, 1949, the Board offered the testimony of Dr. Durkin and the relator offered the testimony of Drs. Parker and Walsh and his own testimony. The relator testified at that hearing that he had suffered chest pains 4 or 5 years before, but suffered nothing serious for some time thereafter; that on May 4, 1949, he, relator, ran up the stairs in the City Hall and had an attack of pain in his chest; that he consulted Dr. Parker who advised him to go home; that June 10, 1949 he had another attack at a fire; that after he received his sick leave on June 11, he took several motor trips to Chicago and St. Louis and drove part of the way and also visited Chicago.

At the hearing before the Pension Board Dr. Durkin, who was specially appointed to examine relator, because Dr. Parker was relator's personal physician, testified that relator was 48 years of age; that he was overweight, and that there was no evidence of organic heart disease. He further testified that relator was suffering from angina pectoris or arteriosclerotic heart disease but based this conclusion on the statements of the relator. He also testified that relator was not able to function as a fireman. Drs. Parker and Walsh testified to the same effect. They all testified that the relator was not feigning or malingering.

The City Clerk and Secretary of the Board testified as to the minutes of the meetings and the Board records. He testified

that he made a motion at the meeting of June 16, that relator's pension be denied and that his motion was lost for want of a second; that on June 20, 1949 he made a like motion and it was adopted unanimously; that on July 11 relator was granted a further hearing which was held on July 21. This witness denied that there was any conspiracy as alleged in the complaint and stated that the decision of the Board was based on the evidence before the Board. He also testified that he was somewhat of a politician as well as a fireman but denied there was any political reason for denying the pension. He admitted discussing the matter with the Mayor and other members of the Board and stated that he believed relator was not suffering from a heart illness and that he voted his honest conviction.

It is insisted by counsel for appellant that mandamus is the proper remedy in this case and that the evidence establishes that the Pension Board abused its discretion and that it acted arbitrarily, unjustly and unreasonably.

Counsel for appellees earnestly urge that mandamus does not lie in this case and that the decision of the Board in this case is final and conclusive.

The application of relator for a pension which he filed on June 15, 1949 was based on Sec. 922, Chap. 24, Ill. Rev. St. (1947) which provides:

"If any such fireman who has actively served for at least ten years shall, as a result of any cause other than the performance of any act or acts of duty, become and be found, upon such examination, to be physically or mentally permanently disabled, so as to render necessary his retirement from service in the fire department, the board of trustees shall retire such disabled member from service in such fire department, and shall order the payment to such disabled fireman monthly from such pension fund, a sum equal to one-half the monthly compensation paid to such fireman as salary, at the date of such retirement."

Section 920 of the same Act provides that the Board shall hear and decide all applications for relief or pensions under the Act and its decision on such applications shall be final and conclusive and not subject to review or reversal except by the Board.

Recent cases in the Supreme Court indicate that mandamus writs are not issued to review the proceedings of administrative tribunals but lie only where it clearly appears that the petitioner has a clear right to the relief he seeks. People ex rel Rude v. County of LaSalle, 378 Ill. 578, People ex rel Elmore v. Allman, 382 Ill. 156, People ex rel Walsh v. Board of Commissioners of Cook County, 397 Ill. 293, People ex rel Illinois Highway Transportation v. Biggs, 402 Ill. 401. Where, however, there is a discretion in an administrative authority and it is clearly shown that such discretion is abused, the court will issue a writ of mandamus. In Illinois State Board of Dental Examiners v. People ex rel Cooper, 123 Ill. 227 distinguishing an earlier case involving the same statute the court said at page 241:

"In The People ex rel. Sheppard v. State Board of Dental Examiners, 110 Ill. 180, we held that the act did not specifically define what was a reputable college, and that it was left to the discretion and judgment of the board to determine what was a reputable college. In that case the mandamus was refused on the general ground that the writ will not lie to compel the performance of acts or duties, which necessarily call for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required. But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown, that the discretion is abused. Such abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case mandamus will afford a remedy."

In People ex rel Schelling v. Watson, 276 Ill. App. 303 in construing a statute similar to the one in the instant case, it is said at page 311:

"The act which created the appellant board and prescribed the conditions under which one might participate in the fund created does not make it discretionary with appellants whether they will or will not grant a pension but makes it mandatory where certain facts exist. Accepting as true the allegations of the amended petition, the action of appellants was arbitrary and unjust to relator, as all the facts are therein alleged which are necessary to entitle him to a pension."

In that case it appeared that a patrolman was shot in the performance of his duties. Later he was thrown from a motorcycle and suffered permanent and incurable injuries which were described. Three doctors' certificates required by the statute were presented but the board ignored the evidence, disregarded the results shown by his physical examination and arbitrarily denied his petition.

In People ex rel Kronenbitter v. Board of Trustees of the Firemen's Pension Fund, 279 Ill. App. 472, a fireman, and in Stiles v. Board of Trustees of Police Pension Fund, 281 Ill. 636, a policeman, who had served twenty years or more in their respective departments, were denied pensions. The courts in both cases held that mandamus should be granted where the petitioner showed he has complied with the statute. These cases establish the proposition that where the Board acted arbitrarily and that, from the evidence presented to it, it is clearly shown that petitioner is entitled to a pension under the statute, the writ should issue.

The evidence before the board in this case consisted of appellant's testimony and that of three doctors one of whom was appointed by the board. These doctors testified that relator was suffering from angina pectoris and was unable to perform his duties in the Fire Department.

In People v. Board of Trustees of the Firemen's Pension

Fund, 95 Ill. App. 300, a writ of mandamus was refused even though the medical evidence indicated a pension should be granted. In the course of its opinion, the court, at pages 302-303, said:

"The petition proceeds on the theory that if the medical officer appointed by the board reports that the applicant for a pension is physically or mentally permanently disabled, by reason of service in the fire department, so as to render his retirement from such service necessary, the board, on receiving such report, has no discretion in the matter, and must retire the applicant, and grant his application for a pension. In other words, that the medical officer and not the board of Trustees, is to determine whether the applicant should be retired and pensioned. We cannot concur in this view. We think it clear that it was not the intention of the legislature to confer such power upon a medical officer appointed by the board to make physical examinations of applicants for pensions. The sole duty of such medical officer is to examine the applicant and report to the board the result of his examination. He has no power to conclusively decide that the applicant shall be retired. * * *

It is the board, not the medical officer, who must finally decide. Decide what? Why, whether such case presented warrants the retirement of the applicant from the service. When application is made for a pension, in such case as the present, manifestly the first question to be decided on the application is whether the applicant should, by reason of disability caused as described in Section 7, be retired; because unless his retirement from the service is necessary, he cannot be entitled to a pension. The board, then, who by Section 3 must decide all applications for pensions, must, in the first instance, decide the question of the necessity of the retirement of the applicant from the service. That is the preliminary question to be decided."

The complaint in the instant case alleged that the members of the Pension Board conspired with the Mayor, the Corporation Counsel and three members of the Board of Fire and Police Commissioners to deprive appellant of his pension and set up certain overt acts. This was denied by appellees and the evidence wholly failed to show any conspiracy.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

7. The above is a true and correct copy of the original as shown to me by the person who presented it to me. I have compared it with the original and it is a true and correct copy of the original.

The Board in its answer stated that it was their opinion that the appellant was feigning and malingering in the description of his symptoms and that the opinion of the doctors were based upon subjective symptoms or case history given them by appellant. A full hearing before the Board was granted appellant. As Fire Marshal he had been a member of the Board and he appeared and testified before the Board, and the members of the Board enjoyed a personal acquaintance with him, and while the record shows that appellant was suffering from angina pectoris or arteriosclerotic heart disease, it also appears from the testimony of the three doctors that they based their opinions on the case history given them by appellant, and each testified that a person suffering from angina pectoris is able to do some kind of work but would have to avoid stresses and excitement.

The law is settled that even though the trial court might arrive at a different conclusion from that reached by the Board, such fact would be no basis for granting the writ. The court must find from the pleadings and evidence that the record clearly shows appellant "to be physically or mentally permanently disabled so as to render necessary his retirement from service in such fire department." *does not so show nor does it* The record ~~must~~ show that the Pension Board ~~clearly~~ abused its discretion.

After a careful study of the record in this case we cannot say that it establishes such a clear case of abuse of discretion, that the court should have ordered the writ of mandamus to issue.

The order appealed from is therefore affirmed.

Order affirmed.

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Abstract

General No. 10482

Agenda No. 18

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

344 I.A. 2-11

February Term, A. D. 1951

MARY FOREMAN FRERICHS,
Plaintiff-Appellee,
vs.
JOHN W. FOREMAN, et al.,
Defendants,
(JOHN W. FOREMAN, Appellant).
JOHN W. FOREMAN,
Counterclaimant-Appellant,
vs.
MARY FOREMAN FRERICHS,
Counter-Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
KANKAKEE COUNTY.

Dove, J.

This case was originally appealed to the Supreme Court directly from the Circuit Court of Kankakee County. The Supreme Court held that no freehold was involved and transferred the cause to this court. (Frerichs v. Foreman, 407 Ill. 507.)

Mary Foreman Frerichs, hereinafter referred to as Appellee, filed her complaint against her former husband, the defendant, John W. Foreman, hereinafter designated as Appellant, and others for partition of one hundred sixty acres of land in

6. 11. 1944

General, 11. 11. 1944

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 11th inst. in relation to the above matter.

I am sorry to hear that you are unable to attend the meeting on the 15th inst. I am sure that your absence will be regretted.

I am, Sir, very respectfully,
Yours faithfully,
[Signature]

Yours faithfully,
[Signature]

In a letter of the 11th inst. you informed me that you were unable to attend the meeting on the 15th inst. I am sure that your absence will be regretted.

I am, Sir, very respectfully,
Yours faithfully,
[Signature]

Kankakee County. The complaint alleged that Charles M. Foreman, the father of appellant, was the owner of the real estate involved herein at the time of his death; that on April 29, 1917, he died intestate leaving Anna Foreman, his widow, and Ida Perry and appellant, his children, his sole heirs. The complaint then set forth several transfers and averred that as a result thereof and the death of the widow, appellant and appellee each became the owner of an undivided one-half interest in said real estate as tenants in common. Appellant filed an answer denying that appellee was the owner of any part of the real estate described in the complaint and filed three counterclaims. Appellee filed an answer to the first counterclaim, and the issues raised by the complaint and answer and the first counterclaim and answer are not involved in this appeal.

To the second and third counterclaims, appellee filed a motion to dismiss, which motion was sustained by the Chancellor. Appellant elected to stand upon his second and third counterclaims, and they were dismissed. From this final judgment of dismissal appellant prosecutes this appeal.

The complaint filed by appellee on August 24, 1949, in addition to alleging the death and heirship of Charles M. Foreman as above set forth further alleged that on May 22, 1923, appellant and his sister and their respective spouses quitclaimed to their mother, Anna Foreman, a life estate in said premises; that on September 2, 1931, the mother, Anna Foreman Nelson, and her then husband, Michael E. Nelson, conveyed the said property to the said John W. Foreman and Ida Perry reserving a life estate to the said Anna Foreman Nelson; that on July 30, 1936, appellant conveyed an undivided one-half of his undivided one-half interest in said real estate to appellee, his then wife; that on May 3, 1937, Ida Perry and her husband conveyed her undivided

one-half of said real estate to appellant and appellee as joint tenants; that on August 2, 1944, appellee conveyed to Eva L. Minor all her interest in said real estate and on the same day Eva L. Minor re-conveyed said real estate to appellee; that the life tenant, Anna Foreman Nelson, died on August 23, 1949, and, as a result of said transfers and the death of the life tenant, appellee and appellant now each owns an undivided one-half interest in said real estate as tenants in common. The answer of appellant denied appellee's title and denied the alleged conveyance by his mother on September 2, 1931.

By his second counterclaim, appellant alleges that he is the sole owner of the real estate in question notwithstanding the deeds referred to in the complaint for partition. He further alleges that on July 30, 1936, he and the appellee were husband and wife; that they were then separated and that appellee was threatening to divorce him; that appellant and his then wife verbally agreed that she would terminate the separation and return to live with him and in consideration therefor he would convey to her an undivided one-half of his undivided one-half interest in the real estate described in the complaint, subject to the executory condition that if she were to dissolve the marital relationship by obtaining a divorce from him, the real estate was to revert to him and that appellee would convey her interest in said real estate to appellant in order to carry out the agreement; that he requested appellee at the time this agreement was made to put said executory condition in writing and include it in the deed of conveyance from him to appellee, or, in the alternative, the said verbal agreement be separately reduced to writing, but that

appellee specifically refused to make any such commitment; that subsequent to the making of said verbal agreement, appellant did convey his interest in said real estate to his then wife under the terms and conditions just alleged; that on July 26, 1944, appellee dissolved the marital relationship by obtaining a divorce pursuant to a complaint therefor filed by her and charged that she has repudiated her agreement to convey her interest in said real estate upon the executory condition above mentioned and has refused to reconvey to appellant the interest in the real estate which she acquired from him.

By his third counterclaim appellant alleges that on May 3, 1937, his sister, Ida Perry, offered to convey all of her interest in said real estate to appellant and appellee, his then wife; that appellant and appellee accepted the offer of appellant's sister subject to the condition that her interest in the real estate be conveyed to appellant and appellee as joint tenants under the executory condition that if appellee were to obtain a divorce from the appellant the real estate so conveyed to them by Ida Perry (the sister of appellant) was to revert in whole to appellant, and appellee was to make a conveyance of her interest therein to him. The third counterclaim then re-alleges the allegations contained in the second counterclaim relative to the dissolution of the marital relationship in 1944 by appellee upon her complaint for a divorce and her subsequent refusal to make a conveyance to appellant in violation of her agreement so to do.

The prayers for relief of both counterclaims are that appellee be required to specifically perform her agreements by conveying to appellant her interest in the real estate sought to be partitioned, or, in the alternative, the money value of her estate in said real estate.

The motion to dismiss counterclaims two and three relies on the rule of res judicata and states that on December 20, 1943, appellee filed in the Circuit Court of Kankakee County a complaint for divorce against John W. Foreman, the appellant; that on July 15, 1944, appellant filed his answer to the complaint for divorce and a verified counterclaim, in which counterclaim he alleged that at various times since the date of the marriage of himself and appellee that the appellee wilfully absented herself from him without cause; that in July of 1936, appellant requested her to return to his home and resume the marital relationship; that appellee demanded, as a prerequisite to her return, that appellant convey to her an undivided one-half interest in his one-half interest in the real estate now in question; that as an inducement to the resumption of the marital relationship, appellant did, on July 30, 1936, convey to her the interest in said real estate so requested; that said conveyance was made solely on the understanding that the marital relationship and cohabitation would be resumed and continued and was made solely as an inducement for her to return and resume and continue said marital relationship and cohabitation; that thereafter appellant purchased from his sister, Ida Perry, her undivided one-half interest in said real estate; that Ida Perry, on May 3, 1937, did by her deed to appellant and appellee,

as joint tenants, convey to them her undivided one-half interest in the real estate; that the purchase price was paid solely by appellant; that title was taken in the names of appellant and appellee as joint tenants solely because of their marital relationship then existing; that the conveyance to appellee was procured by her in pursuance of her scheme to get title to the real estate on the pretense of resuming and continuing the marital relationship and charges that on or about December 11, 1943, appellee deserted appellant without any cause. The prayer of the counterclaim was that the court set aside the conveyance of July 30, 1936, and that appellee be ordered to convey to appellant her interest under the joint tenancy deed of May 3, 1937, or, in the alternative, that appellee be ordered to convey to appellant all of her interest acquired under both deeds.

Appellee's motion to dismiss counterclaims two and three continues by reciting the allegations of her answer to the counterclaim filed by the appellant in the divorce suit. Her answer consisted of a denial of all of the material allegations of appellant's counterclaim except that it admitted the existence of the deeds of July 30, 1936, and of May 3, 1937. Appellee alleged in her answer to this counterclaim that the consideration for the deed of July 30, 1936, was love and affection and that she contributed a part of the consideration for the deed of May 3, 1937, and that she was compelled to leave appellant on December 11, 1943, because of his cruel treatment of her.

Her motion to dismiss further recited that appellee's complaint for divorce and appellant's counterclaim in said divorce suit were heard in open court with both plaintiff and defendant being present and both offering evidence in support of their respective positions and that thereafter on July 26, 1944, the court entered its decree finding that the equities of the cause were with appellee and that appellant had been guilty of extreme and repeated physical cruelty toward appellee and also finding "that defendant (appellant) has not proved any of the material allegations of his said counterclaim and is not entitled to any of the relief therein prayed"; that the decree so entered on July 26, 1944, dismissed appellant's counterclaim and granted to appellee a decree of divorce and ordered the appellant to pay the costs of the suit.

Appellee further alleged in her motion to dismiss that she is one and the same person as the plaintiff who filed the divorce suit and that appellant is one and the same person who filed the counterclaim in the divorce suit and that appellant's cause of action, as alleged in his second and third counterclaims, is barred by the decree of this court entered on July 26, 1944, in the divorce suit and cannot again be relitigated. The appellant filed a counter-affidavit to the motion to dismiss in which he asserted that it appears from the second and third counterclaims in this suit that the cause of action alleged in said counterclaims did not accrue until after the divorce decree was entered and, hence, the decree could not have barred such cause of action, and that it appears on the face of appellee's motion to dismiss that the cause of action alleged in the

counterclaim to the divorce suit was a different cause of action than those alleged in the second and third counterclaims in the instant suit and, consequently, the decree entered in the divorce suit constitutes no bar to the second and third counterclaims.

The Chancellor found that the questions and issues raised in the second and third counterclaims are the same as those raised, litigated and decided between appellant and appellee in the original divorce suit and dismissed the counterclaims.

The sole question presented on this appeal is whether or not the lower court correctly applied the doctrine of res judicata to the issues presented by appellee's motion to dismiss the second and third counterclaims of appellant. In *Godschalck v. Weber*, 247 Ill. 269 at page 274, it is said:

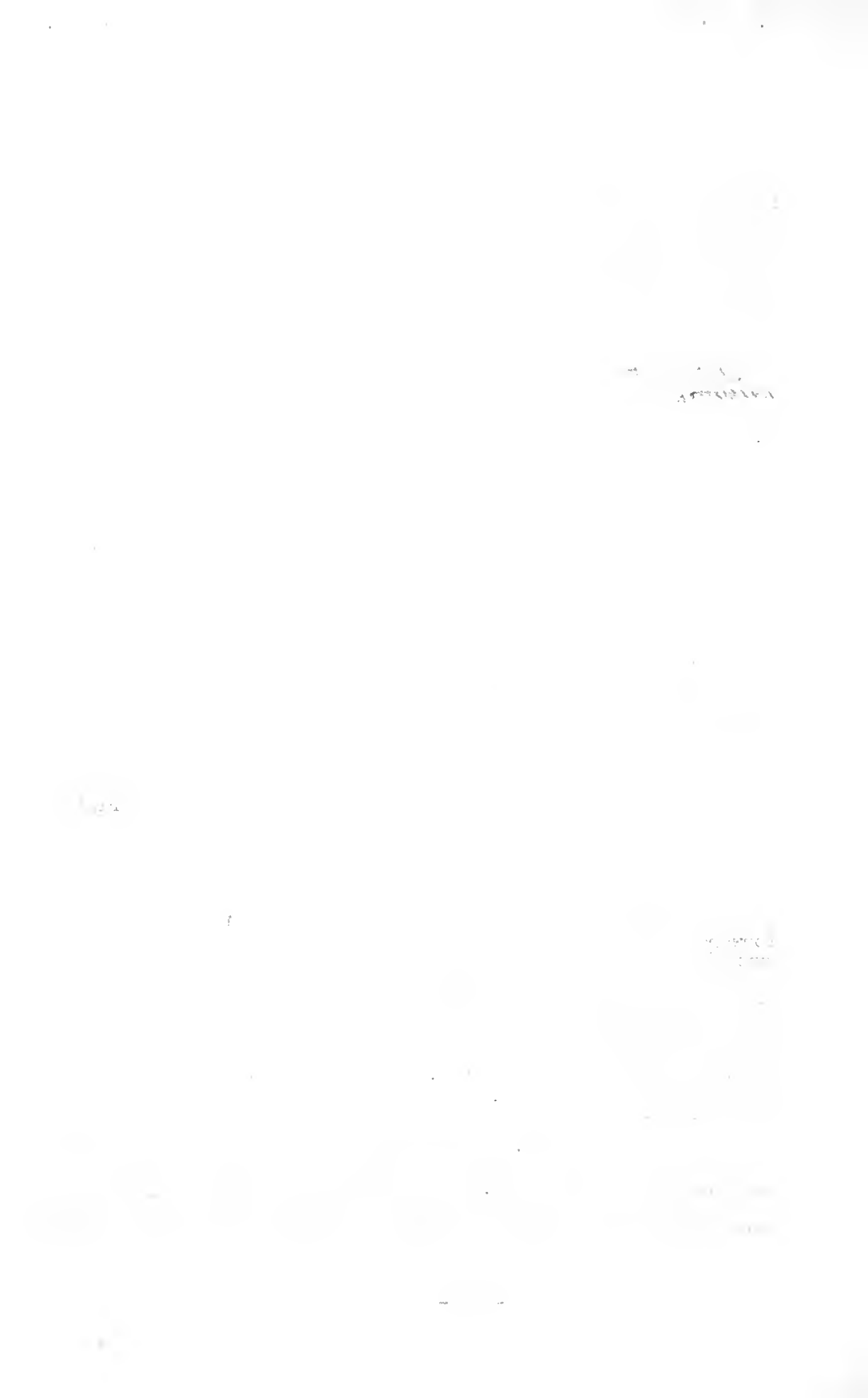
"The doctrine of res judicata extends not only to the questions which were actually decided in the former case, but to the whole controversy,--to all matters properly involved which might have been raised and determined, and to all grounds of recovery or defense which the parties might have presented, whether they did so or not. The rule is so stated in numerous decisions, and the doctrine applicable to this case is thus stated in *Henderson v. Henderson*, 3 Hare, 115: 'In trying this question I believe I state the rule of the court correctly, that where a given matter becomes the subject matter of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted a part of their cause. The plea of res judicata applies not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising

a reasonable diligence, might have brought forward in time.' The principle 'extends not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented.' (Town of Beloit v. Morgan, 7 Wall. 619.) The language of these decisions has been quoted as announcing the true doctrine in Litch v. Clinch, 136 Ill. 410, and Harmon v. Auditor of Public Accounts, 123 id. 122. In the latter case it is said, on page 135: 'Nor is such former judgment or decree conclusive only as to questions actually and formally litigated. It is conclusive as to all questions within the issue, whether formally litigated or not.' In Rogers v. Higgins, 57 Ill. 244, it is said: 'When the complainant before presented his cause of action before the court he should have brought forward and urged all the reasons which then existed for the support of it. The controversy cannot be re-opened to hear an additional reason which before existed and was within the knowledge of the party, in support of the same cause of action.' So it was held in Bailey v. Bailey, 115 Ill. 551; and among numerous other cases to the same effect may be cited Hamilton v. Quimby, 46 Ill. 90; Kelly v. Donlin, 70 id. 378; Allen v. Haley, 169 id. 532; Terre Haute and Indianapolis Railroad Co. v. Peoria and Pekin Union Railway Co. 182 id. 501; Harvey v. Aurora and Geneva Railway Co. 186 id. 283; In re Northwestern University, 206 id. 64."

As we view it, appellant in this case had one cause of action, and one cause of action only, and his cause of action arose out of the alleged violation by appellee of the alleged agreement made between him and the appellee at the time the two deeds in question, as set forth in the pleadings, were executed. Whatever the alleged agreement was, his cause of action accrued when appellee violated it. In the divorce proceeding he alleged, under oath, that the deed of July 30, 1936, was made solely as an inducement to appellee to return and live with him and continue their marital relationship and cohabitation and that the deed of May 3, 1937, from appellant's sister to himself and appellee was made solely because of the marital relationship existing between appellant and appellee. In his second and third counterclaims in the instant proceeding appellant has

shifted his position and avers that appellee was conveyed an interest in the real estate in question by the two deeds upon the executory condition that if she divorced appellant she would reconvey to him any interest that she took under these deeds. The actual consideration under each of appellant's ~~statements~~ ^{statement} of the alleged agreement is that the marital relationship between appellant and appellee was to continue. Appellant knew the truth about the matter as much when he filed his counterclaim in the divorce suit as he did at the time he filed his second and third counterclaims in the instant proceeding. A party is not permitted to shift his position in a second case and thus avoid the bar of a former judgment. In Rubin v. Kohn, 344 Ill. 166, at page 171, the court said: "The purpose of the cross-bills of the plaintiff in error in the former suit was to establish his claim to an equitable interest in the lots in question. The issue in the former suit was, as it is in this suit, the interest of the plaintiff in error in the lots arising out of his arrangement with David Kohn. He knew what that arrangement was as well when he filed his first cross-bill as when he instituted the present suit. He was obliged to bring forward ~~fact~~ his whole case, and it was his duty when he first sought affirmative relief, to assert his claim whether it had its origin in services rendered or the payment of a part of the purchase price." Godschalck v. Weber, 247 Ill. 269, is to the same effect.

Appellant strenuously insists that his cause of action did not accrue until a decree of divorce was granted appellee for the reason that until a decree of divorce was actually granted



to her no violation of the executory condition upon which the two deeds were executed had been made by appellee and that the causes of action, as now asserted in the second and third counterclaims, were nonexistent at the time appellant filed his counterclaim in the divorce action. He contends that the obtaining of a divorce by the appellee was a condition precedent to his requiring appellee to reconvey the property in question to him. Assuming that appellant's present account of the alleged agreement between him and appellee is the true and correct one, no reason has been called to our attention why it could not and should not have been presented at the time of the divorce action in which appellant filed his counterclaim. The complaint filed by appellee for a divorce was for the very purpose of bringing into existence the condition precedent which would give rise to appellant's alleged cause of action as now asserted in his second and third counterclaims. These counterclaims could have been filed then, by way of alternative counterclaims, and relief prayed in accordance therewith if the court granted to appellee a divorce.

We have read the case of *Charles E. Harding Company v. Harding*, 352 Ill. 417, cited by appellant, and find nothing therein contrary to the conclusion we have arrived at. In speaking of the doctrine of *res judicata*, it is there said, (page 426) that a cause of action finally determined between the parties on the merits by a court of competent jurisdiction cannot again be litigated and that a decree so rendered is a complete bar to any subsequent action on the same claim between the parties and that the doctrine extends not only to the questions actually decided but to all grounds of recovery or defense which might have been presented.

After a careful consideration of the record in this case, we cannot escape the conclusion that the questions and issues presented by the second and third counterclaims are the same questions and issues presented in the original divorce suit and counterclaim filed thereto by appellant. The decree entered in that cause is res judicata as to all matters presented in said suit or which could have been presented therein. The order of the Circuit Court of Kankakee County dismissing the second and third counterclaims of appellant is affirmed.

Order affirmed.

012 Nov 2278
No. 10470

Abstract

In the
APPELLATE COURT OF ILLINOIS
Second District
February Term, A. D. 1951

344 I.A. 211²

C. E. ELLIOTT,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court,
	)	Winnebago County.
vs.)	
)	
REV. H. McDONOUGH, GEORGE R. CHILD-	)	Honorable
DRESS, ERNEST F. JEWELL, CHARLIE	)	William R. Dusher,
SCOTT, and LIZZIE ROBERTSON,	)	Judge Presiding.
Defendants-Appellees.)	

BRISTOW, J. -- In an action for libel, instituted by plaintiff, C. E. Elliott, the circuit court of Winnebago County dismissed plaintiff's second amended complaint, and entered judgment in favor of defendants, Rev. H. McDonough, George R. Childress, Ernest F. Jewell, Charlie Scott, and Lizzie Robertson, from which plaintiff is prosecuting this appeal.

The fundamental query in determining whether the circuit court erred in allowing defendants' motion to dismiss the second amended complaint, and in entering judgment for defendants, is whether the letter sent to plaintiff by the Board of Trustees of the church, and indorsed by certain members thereof, could be deemed to be an actionable libel.

From the pleadings it appears that plaintiff had been an active church member for many years preceding the controversy herein. On November 7, 1948, the Board of Trustees, including the defendants, Rev. H. McDonough, George R. Childress, Ernest F.

APPLICANT'S STATEMENT

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From the preceding it appears that plaintiff has been an active church member for many years, preceding the controversy herein. On November 1, 1940, the Board of Trustees, including the defendants, Rev. H. McDonald, George H. Phillips, Priest,

Jewell, Charlie Scott, and Lizzie Robertson, sent plaintiff the following letter, which is set forth in its entirety, so that all statements may be viewed in their proper context:

Rockford, Illinois

Mr. C. E. Elliott

Dear Sir:

This is to inform you that it is the desire of the First Church of God congregation located at 112 South Henrietta Avenue, Rockford, Illinois, to humbly follow their minister, recognizing in him the ability to lead us and the authority of the Holy Spirit in placing our ministry. We, therefore, submit the following recommendation:

In view of the fact that our minister has counseled with you over your attitudes, and advised you to work along with the church group, and your failure to take such advice,

And upon testimony of several members in good standing, you have suggested plans to remove our minister, and that you do vindicate plans to that extent.

In light of these facts which we feel is sufficient evidence that you are out of harmony with our church group and program, and upon the advice of an attorney--we, the working church group constituting the majority membership--therefore, recommend that you repent of such deeds fully, or withdraw from our membership. Such attitudes have rendered you insufficient, and disqualified your right to vote, and is certainly offensive to our minister and church group.

It is hereby requested that all church property such as keys, books, by-laws, and church records be returned to the church secretary upon receipt of this letter.

We trust you will willingly submit. Failure to do so will result in further action.

BOARD OF TRUSTEES:

Dated No. 7, 1948.

George R. Childress
Ernest F. Jewell
Charlie Scott
Lizzie Robertson
Rev. H. McDonough

On the back of the letter the following contents appear:

This is to certify,

We the undersigned indorse the action of this letter, being members of the 1st Church of God Inc. 112 So. Henrietta, Rockford, Ill., and in good standing do hereby affix our signatures.

Rev. H. McDonough, Lizzie Robertson, Mrs. Nellie McDonough, Mrs. Dora Atteberry, Mrs. P. H. Landis, Mrs. Virginia Stewart, Mrs. Alma Morris, Mrs. Nellie

Scott, Alvin Scott, Sam Atteberry, George R. Childress, Boots Calvert, Charlie Scott, Mrs. Goldie Moline, Mrs. Ralph DeMond, Myrtle Brunoehler, Mrs. D. N. Lower, Ernest F. Jewell, Alice I. Jewell, Robert P. Barton, Marie L. Barton, Mrs. Elizabeth Calvert, Hi Calbert, Rosetta Brown, Dovie Calhoun, Anna Dow, Mabel Herbig

In his complaint plaintiff in substance alleged that in this letter, which was allegedly false, the defendants meant and intended to charge that plaintiff was guilty of acts that would tend to destroy the church; that he was guilty of unchristian words and actions, of conduct unbecoming a member of the church, of misconduct, of disseminating doctrines contrary to those of the church, of adhering to doctrines not in harmony with the causes which the church represents, of disobedience to the authority of the church, of neglect of duty, of maladministration in office; and that he was expelled from membership in the church. By reason of these alleged innuendos in the letter, plaintiff claims that his good name was injured; that he was brought into public hatred, contempt, and ridicule; that he has been shunned by diverse persons, ostracized from and deprived of the privileges of the church, and suffered great pain and distress of mind and body, for which he seeks damages in the amount of \$100,000.

The essential allegations of defendants' motion to dismiss the second amended complaint are: that it appears from the face of the complaint that the alleged libel consists of a letter to plaintiff personally, and hence there is no publication of the alleged libelous matter; that the letter contains no libelous matter; that the language does not mean, and is not intended to mean, the innuendos ascribed by plaintiff; that the communication from a church to one of its members, with reference to church business, is privileged, and that plaintiff failed to allege any special damages, which are essential where the alleged libel is not libelous per se.

On the basis of these pleadings, the circuit court granted defendants' motion to strike the complaint, entered judgment for defendants, and ordered plaintiff to pay costs and "take nothing by the suit." From this judgment plaintiff has appealed.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

by the suit." From this judgment, Plaintiff has appealed.

defendants, and ordered plaintiff to pay costs of "these appeals."

defendants' motion to affirm the court's, and said judgment. The

On the basis of these pleadings, the Court is said to have

It is apparent that we cannot sustain plaintiff's contention that defendants, by their motion to dismiss, have admitted not only the contents of the letter, but the alleged innuendos deduced therefrom by plaintiff, since the law is settled that a motion to dismiss admits only the facts well pleaded, and not the inferences therefrom, or the pleader's conclusions of law. (Peo. v. Blair, 87 Ill. App. 570; Peo. v. Bristow, 391 Ill. 101, 103.)

Inasmuch as the motion to dismiss admits only the execution of the letter to plaintiff from the pastor and Board of Trustees of the church which was indorsed by certain members of the church, any alleged libel must appear from the words of the letter itself.

Under the terms of the Illinois statutes, libel is defined as a malicious defamation, expressed wither by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury. (Ch. 38, par. 402, Ill. Rev. Stats.; Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559.)

Upon close examination of the letter herein, it is evident that no intention to maliciously defame plaintiff can possibly be deduced. At most, the letter recognizes the differences of opinion between plaintiff and the church group, and recommends that since plaintiff persisted in his opposition to the program by writing letters and suggesting plans to remove the minister, after having been asked to work along with the group, he was apparently out of harmony with this group, and should either repent or withdraw from membership, for his attitude rendered him offensive to the minister.

These remarks do not impeach his honesty, his integrity, or his reputation. The fact that it is recognized that plaintiff has a difference of opinion with reference to the particular church program, does not expose him to public hatred, contempt, ridicule or financial injury. The letter does not accuse him of acts tending to destroy the church, or of unchristian words and

It is apparent that we cannot sustain plaintiff's contention

that defendants, by their motion to dismiss, have admitted not only the contents of the letter, but the alleged innuendoes suggested therefrom by plaintiff, since the law is settled that a

motion to dismiss admits only the facts well pleaded, and

the inferences therefrom, or the plaintiff's construction of the

(See v. Blair, 55 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

108.)

There is no question as to the fact that the letter was

of the letter to plaintiff from the pastor of the church

of the church which was referred to in the letter itself.

any alleged libel was apparent from the words in the letter itself.

Under the terms of the Illinois statute, libel is defined

as a malicious declaration, expressed or implied, which

signifies a dishonor, or the like, to the person named

of one who is dead, or to his estate, or to his family, or

on reputation, or on his honor, or on his credit, or on

alive, and thereby to cause him to be dishonored, or

ridiculed, or to suffer injury, or to be exposed to

Statute; see v. First National Bank, 111 Ill. 2d 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Upon close examination of the letter, it is evident

that no intention to maliciously injure plaintiff was

deduced. At most, the letter contained the following

opinion between plaintiff and the church, and no

that since plaintiff persisted in his refusal to

by writing letters and suggestions to remove the

after having been asked to work along with the group, he

apparently out of her own will, this group, and should

gent or withdraw from membership, for his attitude

offensive to the minister.

These remarks do not impute to plaintiff, his integrity, or

his reputation. The fact that it is recognized that plaintiff

has a difference of opinion with reference to the particular

church program, does not expose him to public hatred, contempt,

ridicule or financial injury. The letter does not accuse him of

acts tending to destroy the church, or of malicious words and

deeds. There is no suggestion or implication that he has been guilty of neglect of duty or maladministration. Any such innuendos are gratuitous deductions, and cannot reasonably be inferred from the simple, unambiguous language of the letter.

The terms and purport of the letter herein are in no way comparable to those in Call v. Larabee, 60 Ia. 212, 14 N.W. 237, relied upon by plaintiff as an authority. Plaintiff in the Call case, supra, was censured, not in a personal letter, but in a public proclamation, addressed "To Whom It May Concern," which stated that plaintiff was "utterly unworthy of their confidence as a Christian," and was considered as a "man of immoral character, and not worthy of a place in any church of Jesus Christ," and that "his presence at our meetings is not desired by us until we have clear evidence of a decided change in his character."

There is no such censure or defamation of character herein, but merely a recital that plaintiff's attitude with reference to the church program is out of harmony with the group, and he is asked, in effect, to conform to the program, or to withdraw from membership.

Similarly, the case of Over v. Hildebrand, 92 Ind. 19, cited by plaintiff, is in no way determinative of whether the letter herein is libelous. The issue in that case was whether certain evidence with reference to a disciplinary proceeding by the church was improperly rejected. The court held that, inasmuch as it was competent for the plaintiff therein to prove that the church council, in passing the resolution complained of, was not acting within its lawful authority, it was error to have refused evidence that the proceedings were without citation or notice to him. Not only is the issue before the court entirely distinguishable, since it involved the relevancy of evidence, but the alleged libelous conduct therein was a forceful public resolution, whereby the plaintiff therein was accused of making abusive statements, breaking up the choir, refusing to withdraw his statements after admonishment, and was censured for "unlawful and unchristian

conduct in disturbing the peace and injuring the welfare of the congregation."

As hereinbefore noted, there are no accusations of unlawful and unchristian conduct herein, and the words of the letter cannot reasonably be deemed to be libelous. ✓

Moreover, plaintiff's second amended complaint was legally insufficient on the further ground that plaintiff's allegation to damages are merely general, and, "unless the language used is libelous per se, a plaintiff must aver in his declaration that special damages have resulted, and what they are. (Campbell v. Morris, 324 Ill. App. 569.)

In the light of the foregoing analysis, it is unnecessary to determine whether the complaint was insufficient in failing to allege facts constituting publication of the alleged libelous matter. With reference thereto, the general rule is that communication of libelous matter by a letter to the person defamed, does not amount to a publication sufficient to sustain a civil action for damages. (24 A.L.R. 327; A.L.R. 562; Busby v. First Christian Church, 95 So.869.)

It is our judgment, therefore, that plaintiff's second amended complaint herein failed to allege facts constituting an actionable libel, and hence, the order of the circuit court allowing defendants' motion to strike and entering judgment for defendants was not in error, and should properly be affirmed.

JUDGMENT AFFIRMED.

"no. 1234567890"

As previously stated, there are no indications of a shift in the position of the United States and Australia toward Britain, and the course of the latter's foreign policy remains the same.

Abstract

Gen. No. 10447

Agenda No. 9

In The
APPELLATE COURT OF ILLINOIS
Second District
October Term, A. D. 1950.

JAMES PALEFRONE, FLORIAN
KOTOWSKI, ARNOLD SLETTA,
OSCAR JACOBS and PETER
PADILLA,
Plaintiffs-Appellants,
vs.
EVERETT J. SHELTON and
GLENN GAGE,
Defendants-Appellees.

3441A. 212

Appeal from the
Circuit Court of
LaSalle County.

Dove J.

On the evening of December 7, 1944 the plaintiffs were riding as paid passengers in a passenger bus operated by Victory Lines, Inc. They were returning to their homes in Ottawa from the shipyard at Seneca. They were seated at various places along the left-hand side of the bus at the time the bus was involved in a collision with a truck which was then being driven by defendant, Glen S. Gage, who was in the employ of the other defendant, Everett J. Shelton. As a result of the collision the plaintiffs sustained personal injuries and thereafter filed their complaint to recover damages for the injuries sustained.

The complaint alleged that the bus was proceeding in a westerly direction on U. S. Route 6 about three miles east of Ottawa; that Route 6 was a two-lane paved highway;

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+ that the truck was loaded with crushed stone and was being driven in an easterly direction; that the upper portion of the body of the truck flared out or extended out many inches beyond both sides of the truck as originally constructed; that the defendants drove the truck with a portion thereof extending over the middle line of the highway and so close to the left side of the passenger bus that the flared out portion of the truck collided with the left-hand side of the bus. The answer of the defendants admitted that the plaintiffs were riding in the bus on the evening in question but denied all the allegations of due care and negligence. The issues thus made were submitted to a jury resulting in a verdict of not guilty upon which the court, after overruling a motion for a new trial, rendered judgment and the record is brought to this court for review upon an appeal by all of the plaintiffs. ✓

+ No question is raised as to the pleadings, the admission or exclusion of evidence or the giving or refusal to give instructions covering the law of the case. The sole point presented by this appeal, states counsel for appellants, is that the verdict and judgment are contrary to the manifest weight of the evidence. In their argument counsel state that the "not guilty"-verdict "is absolutely unexplainable" and that the judgment rendered upon such a verdict "results in a miscarriage of justice."

+ The evidence discloses that the truck involved in the collision was a one and one-half ton International Truck with a steel body with a flared out box built of wood on top of the regular steel body. The original body was 2½ or 3 feet high and the truck was used for hauling coal and limestone and at the time of the accident was loaded with six or

seven tons of lime rock. The truck had four wheels on the rear axle and two on the front. It was equipped with an electric wind shield wiper on the driver's side which was operating as it was raining and sleeting. It was also equipped with headlights and a tail light but no lights at the edge of the body and no clearance lights. The truck was proceeding on Route 6 which was a two-lane concrete highway with a black line down the center. The defendant, Glen L. Gage, was called and examined by plaintiffs under Section 60 of the Practice Act and testified that he was driving the truck at the time and was proceeding at a speed of between 30 and 35 miles per hour. In the seat with Gage was the other defendant, Everett J. Shelton, and a boy, Robert Mann, was seated between them. It was raining and the head lights were lighted on low beam and Gage testified that he could see the pavement in front of him for 20 or 25 feet; that he realized that a bus was approaching him when it was 100 or 150 feet away; that both vehicles were on a slight curve and the highway was down-grade for the truck and up-grade for the bus. On January 8, 1945 Gage signed a written statement hereinafter referred to in which he stated that as the bus approached his truck it appeared to him to be on its own side of the roadway.

Everett J. Shelton, the other defendant, testified that he was sitting in the cab of the truck on the right hand side of the seat at the time of the accident; that there was no windshield wiper on the half of the windshield where he was sitting and that he could not see through that part of the windshield very much; that it was raining and sleeting

and some of the sleet was freezing on the windshield; that the speedometer on the truck was not working but he estimated the speed of the truck at 35 miles per hour before the accident and that he did not see the bus until the instant the crash occurred; that the crash did not jar the truck enough for him to feel it; that the noise was not very loud and it was the flare on the portion of the truck some 5 inches back of the driver's cab which came in collision with the bus. This witness further testified that he built the flared-out wooden body of the truck out of yellow pine and did the best he could to keep it under 8 feet in width and he testified that he felt it was at least 2 inches under the 8 foot permitted by law. He further testified that he did not know whether any portion of this truck was over the center line of the road or not.

Clarence Midnight testified that he was a tavern operator, 50 years of age, but at the time of this accident he was driving the bus involved in the collision. That the bus had two head lights in the front fenders, 3 amber colored lights above the windshield, together with cab lights and side lights. He testified that on the night of the accident it was a little misty but not freezing; that the widest part of the body of the passenger bus was 8 feet; that the bus was equipped with hydraulic brakes which were in good operating condition and that as he approached the point of the accident he was driving about 35 miles per hour; that he observed the head lights of the approaching truck and testified that they were close to the black line and that when he first noticed the flare boards on the truck, the truck was 10 feet

away from the bus; that at the time he saw the flare boards he determined that they were in his traffic lane. He further testified that the bus he was driving was on the north side of the black line in its proper traffic lane and that just after he saw the flare boards there was a crash and the windows of the bus were all broken but no part of the fender, bumper or running board of the bus was damaged and no part of the bus in front of the driver's seat came in contact with the truck. This witness further testified that at the time of the collision his bus wheels were about 24 inches to the right of the center line; that the body of the bus was 8 feet wide and extends beyond the front wheels about 18 inches and extended about 6 inches over the back wheels at the sides; that at the time of the collision his bus was on the north side of the center line in its proper traffic lane and that he brought the bus to a stop within 10 feet after the crash and did not swerve the bus before the crash.

James Palefrone, one of the plaintiffs, testified that he was 48 years of age and in the fall of 1944 was employed in the shipyards at Seneca; that on the evening in question he was sitting in the bus in the second or third seat on the left side of the bus and in front of him were two of the plaintiffs, Pete Paddilla and Florian Kotowski; that it was misty and raining and he could not see out of the window; that the bus was not going fast but proceeding along in a straight line and he observed the head lights of the traffic going by and all at once he was knocked into the aisle and he received an eye injury.

Florian Kotowski testified that he was a passenger on the bus on the night in question, sitting beside the plaintiff, Pete Paddillo; that he was familiar with this highway, having been on it hundreds of times before; that he was looking out of the front windshield of the bus and observed the head lights of the defendant's truck 300 feet away; that the bus driver was in his proper traffic lane; that he observed the truck as it approached the bus and it was over the black line and into the traffic lane of the bus. This witness further testified: "The truck kept coming toward us hugging the line and when it came close enough to the bus headlights the dual outside, the left outside rear dual was on the line. You could see that." He was then asked: "What happened then" and he answered: "As soon as I heard the crash I put my hands to my face. I just heard glass flying and there was a crash of glass and steel and when it was all over we were in the aisle of the bus. Pete was on top of me or I was on top of him and I got some cuts and bruises." On cross examination he testified that he could see clearly through the windshield; that the road was comparatively straight with a slight incline; that he was sitting back of the driver and could see a truck coming 300 feet away. Upon a pre-trial deposition this witness was asked: "The bus was on its right side of the road and the truck was on its side of the road" and he answered: "That is right." At this time he also testified that there was no space between the black line marking the center of the road and the tires of the truck. This witness further testified that when the truck was 15 or 20 feet away from the bus the flare boards were then visible and that the truck kept on a straight course until the crash and that before and

continuing up to the time of the collision the wheels of the truck were hugging the black line.

Arnold Sletta testified that he was 21 years of age and was in the bus at the time of the accident occupying the fourth seat back of the driver on the left hand side and was sitting alone; that he did not see the truck before the accident happened and the first thing that he knew after the accident was that someone was helping him back to his seat, as he had been thrown to the floor in the aisle.

Oscar Jacobs testified that he was riding in the bus as a passenger on the left hand side in a seat by himself and he, too, as a result of the collision, was thrown to the floor of the aisle and was unconscious for a short time but was able to get out of the bus when it arrived at the Ottawa hospital. This witness testified that he was dozing at the time of the accident and did not see the truck nor did he know whether the bus was on the right or wrong side of the road.

Peter Paddilla testified that he was sitting in the passenger bus in the second seat behind the driver next to the window; that he did not see the truck very well before the collision and the next thing he knew was that he was on the floor and Florian Kotowski was on top of him. On cross examination he testified that he did see the truck about 10 or 15 feet away and knew the truck was close to the bus.

The statement made by the defendant, Glen Gage, on January 8, 1945 which was identified by Gage and admitted in evidence is as follows: "Referring to the accident which

occurred December 7, 1944. Time: 6:30 P. M. at or near U. S. No. 6 and three miles east of Ottawa, Illinois. I hereby make the following voluntary statement. On the above date I was driving Shelton's truck eastbound on U. S. No. 6 at about 35 to 40 miles per hour. It was misting outside but my side of the windshield was clear. I had my headlights on low beam because I was meeting a steady stream of west bound traffic. I saw this bus coming, westbound, and the bus had clearance and marker lights burning. The bus had lights on low beam. I feel that I was on my side of the center line. There were not any clearance lights or marker lights on this truck at the time of the accident. As the bus approached me it appeared to be on its own side of the roadway."

. The defendants offered no evidence except a photograph of the highway which we have examined and considered; we have also examined the several photographs showing front and side views of the truck and bus after the collision which were offered in evidence by the plaintiffs.

We have read and considered the evidence found in this record as abstracted by counsel for appellants and the further abstract furnished by counsel for appellees and have examined the photographs found in the record and are clearly of the opinion that the weight of the evidence discloses that at and just before the time the collision took place the bus in which appellants were passengers was travelling in its proper lane of traffic and was struck by the flared out portion of the truck which was owned by one of the appellees and operated by the other appellee; that as a direct

result thereof appellants were injured and that appellants were not guilty of any act which caused or contributed to cause the collision. The issues presented by the pleadings should, therefore, be submitted to another jury for determination.

When this cause was submitted and taken under advisement, we also took with the case the motion of appellees suggesting a diminution of the record and asking leave to incorporate into the record a minute judgment order entered by the Circuit Court on March 28, 1947, and for an order dismissing this appeal. Accompanying the motion was a certified copy of the so called minute judgment order entered on March 28, 1947. This minute judgment order is set forth in our former opinion (Palefrone v. Shelton, Ill. App. ⁹⁹) and which, in our opinion, was not a final judgment and we so suggested to counsel at the conclusion of the oral argument when the case was submitted to us and an attempt was made to correct the same in the trial court by an ex parte order entered November 28, 1947. We held that this order of November 28, 1947 was entered while this case was pending in this court and that the minute order of March 28, 1947 was not a final judgment and dismissed the appeal.

The judgment from which appellants now appeal was entered on April 18, 1950 upon notice and a full hearing. That judgment is a final judgment complete in every respect and fully disposes of the merits of the controversy. There

is no merit in appellees' motion to dismiss the appeal and that motion will be denied.

For the reasons stated the judgment of April 18, 1950 is reversed and the cause remanded to the Circuit Court of LaSalle County for a new trial.

Judgment reversed and cause remanded.

is no basis for a finding of liability on the part of the
and that action will be taken.
For the purpose of the hearing, the hearing is held on
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General No. 10466

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IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT 344 I.A. 213

February Term, A. D. 1951

KLEINSCHMIDT LABORATORIES, INC., a Delaware Corporation,)	
Plaintiff-Appellee,)	
vs.)	
MARIE J. KLEINSCHMIDT,)	
Defendant-Appellant.)	

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY, ILLINOIS.

Dove, J.

Kleinschmidt Laboratories, Inc., filed its amended complaint in forcible detainer against Marie J. Kleinschmidt, for the possession of certain premises described in the amended complaint and located at 2620 North Deere Park Drive, in Highland Park, Illinois. Defendant answered the amended complaint and denied that plaintiff was entitled to possession of the premises in question. Plaintiff then made a motion for summary judgment under Section 57 of the Civil Practice Act (Ill. Rev. St. Chap. 110, Par. 191) and Rule 15 of the Supreme Court (Ill. Rev. St., Chap. 110, Sec. 259.15) and supported its motion by certain affidavits. Defendant opposed the motion of plaintiff for summary judgment and filed a counter-motion for summary judgment in her favor, or in the alternative, for a stay of these proceedings pending the outcome of certain litigation

then pending between Edward E. Kleinschmidt and the defendant, Marie J. Kleinschmidt, and supported her motion by certain affidavits.

After a hearing on the respective motions for summary judgment, the court granted the motion of the plaintiff and entered summary judgment in its favor for possession of the premises in question and denied the counter-motion of defendant for summary judgment in her favor and also denied her alternative motion to stay these proceedings pending the outcome of the other litigation between Edward L. Kleinbaum and defendant. It is to reverse this judgment that defendant brings the record to this court for review.

Counsel for appellant insists that the trial court erred in entering a summary judgment because there was a disputed question of a material fact presented by the affidavits filed in support of or in opposition to the granting of appellee's motion for summary judgment, and that the court erred in awarding possession of the premises to appellee because appellant had a homestead interest therein.

By its amended complaint, appellee alleged that on or about July 1, 1945, Edward E. Kleinschmidt vacated said premises on or before January 1, 1950, but that appellant remained in possession thereof after January 1, 1950; that the verbal agreement under which the appellant's husband entered into possession of the premises was terminated as of January 1, 1950, by and with the consent of appellant's husband and that after January 1, 1950, the appellant continued to occupy, and is now occupying, the premises in question without the permission, agreement or consent of appellee. The amended complaint concludes that appellee is

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entitled to immediate possession thereof and that appellant unlawfully withholds possession of the same, although appellee has made a written demand therefor.

By her answer, appellant denied that she was unlawfully withholding from the appellee the possession of the premises and, after a lengthy recital of the marital difficulties between her and her husband, Edward E. Kleinschmidt, and of the various suits pending between them, asserted that she had a homestead interest in these premises by virtue of being the wife of Edward E. Kleinschmidt, and that she was occupying said premises as her homestead. She set up in her answer that there was a divorce suit pending in Florida by Edward E. Kleinschmidt against her, also a suit to determine her property rights as against appellee and her husband in the United States District Court in Chicago, and, also, a divorce suit pending by her in the Circuit Court of Lake County, Illinois, wherein the appellee is a defendant along with her husband, Edward E. Kleinschmidt.

In support of its motion for summary judgment, appellee filed the affidavit of Edward F. Kleinschmidt, who is a son of Edward E. Kleinschmidt. In his affidavit, this affiant stated that the appellee was a duly chartered corporation of the State of Delaware; that he was its vice president and that he had been an officer of appellee continuously since January 11, 1938, and that he was familiar with the records and affairs of appellee; that appellee acquired title/ and became the owner of the premises in question on December 1, 1939, by virtue of a deed dated that day and executed by Edward E. Kleinschmidt, the then owner of the premises, and his wife, Marie J. Kleinschmidt, appellant herein; that appellee has been the owner of said premises since the date of the aforesaid deed and still is the owner; that

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations of the research.

2. The second part of the report is a literature review. It discusses the previous research on the subject of the study. It mentions the findings of the previous studies and the gaps in the knowledge. It also mentions the theoretical framework of the study.

3. The third part of the report is a description of the research methodology. It discusses the research design, the data collection methods, and the data analysis methods. It mentions the sample size and the sampling method. It also mentions the reliability and validity of the research.

4. The fourth part of the report is a presentation of the research findings. It discusses the results of the study and the conclusions drawn from the findings. It mentions the statistical significance of the results and the practical implications of the study.

5. The fifth part of the report is a discussion of the research findings. It discusses the strengths and weaknesses of the study and the limitations of the research. It mentions the contributions of the study and the suggestions for future research.

6. The sixth part of the report is a conclusion. It summarizes the main findings of the study and the conclusions drawn from the findings. It mentions the practical implications of the study and the suggestions for future research.

7. The seventh part of the report is a list of references. It lists the books, articles, and other sources used in the study. It mentions the authors, titles, and publication details of the references.

8. The eighth part of the report is an appendix. It contains the raw data, the calculation sheets, and other supplementary materials. It mentions the details of the appendix and the location of the materials.

9. The ninth part of the report is a glossary. It defines the key terms and concepts used in the study. It mentions the meaning of the terms and the context in which they are used.

10. The tenth part of the report is a list of figures and tables. It lists the figures and tables included in the study. It mentions the titles and descriptions of the figures and tables.

[Faint handwritten notes at the bottom of the page]

January 9, 1941, until March 1, 1950, he was secretary of appellee and thus familiar with its records and affairs; that appellee became the owner of the property at the time and in the manner set forth in the affidavit of Edward E. Kleinschmidt, hereinabove set forth; that during part of the year 1949, and prior thereto, the premises in question were occupied by Edward E. Kleinschmidt as tenant of appellee under an informal verbal agreement whereby the said Edward E. Kleinschmidt was to occupy the premises so long as it suited the convenience and business interests of him and appellee; that appellant was at the times mentioned, the wife of Edward E. Kleinschmidt, and she occupied the premises with him; that during the latter part of the year 1949, Edward E. Kleinschmidt advised appellee that he no longer desired to occupy the premises and that he wished to terminate his tenancy; that on November 5, 1949, appellee notified Edward E. Kleinschmidt, in writing, to vacate the premises by January 1, 1950; that Edward E. Kleinschmidt acknowledged receipt of the notice to vacate and vacated the premises in accordance therewith; that appellant continued to occupy said premises and refused to vacate the same; that affiant on behalf of appellee served upon appellant a written demand for immediate possession; that appellant continued to withhold possession after the demand to vacate was served upon her; that appellee has not consented to the occupancy of the premises by appellant and has not entered into a lease or any agreement of any kind with appellant for the occupancy of said premises, and that appellant wrongfully refuses to surrender possession thereof to appellee.

Attached to Mead's affidavit, as Exhibit "A," was a copy of the conveyance by Edward E. Kleinschmidt and appellant

to the appellee of the premises in question, which conveyance was a statutory quitclaim deed and included a release and waiver of all rights, under the homestead exemption laws. Also attached to his affidavit, as Exhibit "B" was the copy of the notice from appellee to Edward E. Kleinschmidt to vacate the premises by January 1, 1960, and, as Exhibit "C," a copy of the demand on appellant for immediate possession.

The other affidavit filed by appellee was that of William H. Quelly. In his affidavit he recited that he was the secretary and general counsel of appellee and he then set forth in detail the various suits pending between appellant and her husband. In his affidavit he set forth that appellant filed a motion for a restraining order in the United States District Court at Chicago in the suit there pending wherein appellant was plaintiff and appellee and Edward E. Kleinschmidt were defendants; that in said motion she prayed that the District Court issue an order restraining appellee from exercising any control over the property here in question and restraining appellee from proceeding with this suit, and that as grounds for her said motion appellant stated, among other things, that she had an equitable defense only to this forcible detainer suit then pending in Lake County, and that said equitable defense was not available to her, as a matter of law, in the forcible detainer action sought to be enjoined; that the District Court overruled her motion for an order restraining the prosecution of this suit and held that said District Court did not have jurisdiction to proceed with respect to any of the matters set up by appellant in her motion until such time as proper service was had on Edward E. Kleinschmidt, a copy of the memorandum opinion of the judge making said ruling being attached to the

affidavit as an exhibit. This affiant also set forth in his affidavit that appellee acquired title in the manner and at the time stated by Kleinschmidt and Mead in their affidavits, and that appellant released and relinquished any claim she might have in said property by the execution of the deed from her and her husband to appellee wherein she released any right or claim of a homestead under the laws of the State of Illinois.

By her affidavits in opposition to appellant's motion for summary judgment and in support of her contention for summary judgment in her favor, appellant admitted the conveyance of the property to appellee by herself and her husband, as set forth in the affidavits submitted by appellee. She did not deny that appellee held the legal title but asserted an equitable right to have the conveyance from her and her husband to appellee set aside. She admitted that there was a tenancy of some kind between her husband and appellee but that her husband, being the ~~owner~~ controlling owner of appellee, dictated the terms of his tenancy and possession from appellee. She failed to set forth any facts which would negative the verbal agreement alleged in appellee's affidavit to have been made between appellee and Edward E. Kleinschmidt. She did not deny that Edward E. Kleinschmidt notified appellee that he no longer desired to occupy the premises, nor did she deny that appellee notified Edward E. Kleinschmidt to vacate the premises by January 1, 1950, but admitted that she is still in possession of the premises. She set forth in her affidavit that appellee was really a personal holding company for Edward E. Kleinschmidt and was merely a corporate fiction to enable him to accomplish certain illegal and fraudulent purposes wherein she would be deprived of her right to occupy the premises. She sought to sustain her right to possession of

the premises upon an alleged agreement between her and her husband whereby she signed the deed conveying the premises to appellee in return for her husband's promise that she could continue to live therein during her lifetime if she predeceased her husband and during his lifetime and for two years thereafter if he predeceased her. And incorporated in her affidavits by reference her previous motion filed in this cause wherein she narrated the marital difficulties of herself and her husband, of the relations between her husband and appellee, and of her husband's occupancy and improvement of the premises.

A motion for summary judgment should be granted where there are no facts to be tried. (Scherf v. Esters, 243 Ill. App. 525; Soelke v. Chicago Business Men's Racing Association, 314 Ill. App. 336). In Scherf v. Esters, supra, at page 531, the court said: "The purpose of the summary judgment procedure is not to try an issue of fact, but to determine whether there is an issue of fact. The matter is necessarily inquisitorial. If there is a material issue of fact, it must be submitted to the trier of fact, whether a jury or a court without a jury. The right of the moving party to a judgment should be free from doubt. Bertlee v. Illinois Publishing & Printing Co., 320 Ill. App. 490; Great Atlantic & Pacific Tea Co., v. John H. Rosen, 327 Ill. App. 39. In Whirley v. Ellis Prier Co., 379 Ill. 105, our Supreme Court said (110): 'If there is anything left to go to the jury the motion for summary judgment is denied. If what is contained in the affidavits would have constituted all of the evidence before the court and upon such evidence, there would

be nothing left to go to the jury, and the court would be required to direct a verdict. then a summary judgment will be entered. W

The issue thus presented is: From a comparison of the affidavits filed by the parties in support of their respective motions, was there any material issue of fact to be determined? If not, the court properly entered summary judgment. If there was, the allowance of appellee's motion for summary judgment was error. After a careful consideration of the affidavits filed by both parties, we find the following facts are undisputed: (1) That the appellee was the holder of the legal title to the premises in question and had been since December 1, 1939, the date when Edward A. Kleinschmidt and appellant executed their conveyance to appellee, which conveyance included a release and waiver of the right of leasehold interest by appellant in the manner required by law; (2) That after the aforesaid conveyance was made to it, it rented the premises to a third party and received the rent therefor without objection by appellant; (3) That appellee permitted Edward A. Kleinschmidt to occupy the premises from 1945 to January 1, 1950, under an informal agreement whereby he was to occupy the premises as long as it suited the convenience of appellee and himself; (4) That sometime during the latter part of 1949, Edward A. Kleinschmidt advised appellee that he no longer desired to occupy the premises; that appellee notified Edward A. Kleinschmidt to vacate the premises by January 1, 1950, and he did so vacate said premises on or before that date; (5) and that appellant has retained possession of the premises since January 1, 1950, and that appellee has made a written demand upon her for possession thereof.

As required by Rule 15, the affidavits of appellee show that they are made on the personal knowledge of the affiants and that the affiants, if sworn as witnesses, could testify to the facts therein stated. Certified copies of the various exhibits referred to in the affidavits were attached.

The defenses asserted by appellant in her answer, motions and affidavits in support thereof were equitable defenses and are conceded by her to be such in her petition filed in the United States District Court wherein she recognized that such defenses were not available to her in this forcible entry and detainer action. That such is the law, there can be no doubt. (Wain v. Albany Park Hotel Sales Co., 312 Ill. App. 357; Wain v. Wain, 319 Ill. App. 78.)

As to appellant's contention that she has a homestead interest in these premises, there is no merit, for a wife has a right to retain the possession of premises after the lease between her husband and the owner of the premises has expired. (Harker v. Levy, 302 Ill. App. 571; Wink v. Wink, 11 Ill. App. 513.) Any right which appellant had in this property was derived by her through her husband, or it was he who contracted with appellee for the lease of the premises. When the husband's right under the lease was extinguished by his vacation of the premises in response to appellee's notice to vacate, appellant's right to live therein was likewise extinguished. This rule was clearly announced by our Supreme Court in Watt v. Watt, 402 Ill. 35, which was a forcible entry and detainer action. In that case the court said at page 37, omitting citations: "We will not discuss the question as to whether John Watt had an estate of homestead in

the property described in the petition, but for purposes
estate.
here will assume he had a homestead/ An estate of home-
stead cannot be more extensive than the interest in the
land to which it attaches. If the householder has an
estate in fee, the estate of homestead may likewise be a
fee, but if the householder has only an estate for life
or for years, the estate of homestead will expire at his
death or at the expiration of the term of years. The
estate of homestead has no separate existence independent
from the title which imports it and from which it cannot
be separated. If a householder in whom an estate of home-
stead is vested dies, the estate, by operation of law,
continues for the benefit of the surviving spouse for life
and children during minority (section 2 of the Homestead
Exemption Act) but if the estate of homestead of the
householder is based on a life estate or a term of years,
the estate cannot continue after the basic estate has
terminated."

Every fact necessary to support a judgment for
possession in a forcible detainer action was unequivocally
stated in the affidavits of appellee in support of its motion
for summary judgment. None of the allegations in the affidavits
filed by appellant in opposition to the motion of appellee
controverted any necessary fact to support the judgment
entered. There was thus no issue of fact to be determined.
There was nothing left for a jury or the court to try.

Inasmuch as appellant cannot avail herself in this
proceeding of any equitable defense which she may have to
appellee's right to the possession of this property, the
judgment entered by the trial court was correct and is affirmed.

Judgment affirmed.

Abstract

General No. 10461

Agenda No. 27

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1951

WILLIAM R. REICHSTEIN,

Plaintiff-Appellant,

vs.

OMA REICHSTEIN,

Defendant-Appellee

Appeal from the
Circuit Court of
Winnebago County.

Dove, J.

On May 2, 1950, the plaintiff, William R. Reichstein, filed his complaint in the Circuit Court of Winnebago County praying that the marriage between him and the defendant, Oma Reichstein, be annulled. The complaint alleged that the plaintiff was a resident of Winnebago County, Illinois; that he first met the defendant on June 10, 1949, ^{and} that on June 16, 1949, he engaged in a marriage ceremony with the defendant. The complaint then alleged that prior to June 16, 1949, he had never had sexual intercourse with the defendant but that in the latter part of July or in the early part of August, 1949, he learned that the plaintiff was five months pregnant; that thereupon he ceased to live with her and has had no marital relations with her since that time. The complaint further alleged that on December 1, 1949, the defendant gave birth to a child, but that he, the plaintiff, was not the father of said child and has at all times refused to recognize said child as belonging to him.

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THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

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WASHINGTON, D. C.

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On May 31, 1950, the defendant, by her attorney, Maxwell Pinkelman of Middletown, Ohio, filed her answer in which she denied that plaintiff was a resident of Winnebago County but admitted that on June 10, 1949, the parties engaged in a marriage ceremony which, she avers, was a legal ceremony and that the parties were legally married on that date. She denied that she and the plaintiff met for the first time on June 10, 1949, and alleged that they met prior to March 1, 1949. By her answer, she admitted that she gave birth to a child on December 1, 1949, but denies that the plaintiff is not the father of that child; she insists that the plaintiff is the father of said child, Jerry Edward Reichstein, and avers that the plaintiff knew of her condition at the time they were married, acknowledged that he was the cause of her condition and, after the marriage had been performed, he acknowledged the unborn child to be his. By her answer she denied that the plaintiff coaxed to live with her as alleged in the complaint and averred that she and the plaintiff lived together as man and wife in September, 1949.

After the cause was at issue the record shows that it was regularly set for trial for July 6, 1950, and ^{defendant's} ~~the~~ attorney duly notified of the setting by the Circuit Clerk and also by Mr. Mayo, one of the attorneys representing the plaintiff. Upon the day set for the hearing the defendant did not appear, nor was she represented by counsel. The plaintiff did appear with his attorney, and the hearing was entered upon. At the conclusion of the hearing that day, the court continued the cause until July 14, 1950, and at the conclusion of the hearing ^{on July 14, 1950} ~~the day~~ the court dismissed the complaint and rendered judgment that the plaintiff take nothing by his suit, that the defendant go hence without day, and that the plaintiff pay the costs. To reverse that decree, the plaintiff brings the record to this court for review.

Appellee has not appeared in this court nor filed any brief, and the case was not argued orally. Instead of reversing the decree pro forma, as provided by our rules, the court has concluded to review the record.

The plaintiff testified that he was at the time of the hearing twenty-five years of age; that he enlisted in the Marine Corps of the United States in 1943 and re-enlisted in 1947, and at the time of his enlistment, he was residing in Winnebago County, Illinois. In June, 1949, he was in the service and attending school at Ft. Knox, Kentucky; that at Ft. Knox he met the brother of defendant and went with him to his home in Middletown, Ohio, and there became acquainted with defendant on June 11, 1949; that on June 16, 1949, one week later, the parties hereeto went to Newport, Kentucky, and were married; that shortly thereafter she returned to her home in Ohio and he to Ft. Knox; that at no time prior to June 16, 1949, did he have sexual intercourse with defendant; that prior to July 12, 1949, she told him that her side hurt her, and he suggested that she go to a doctor; that on July 12, 1949, he received a letter from her in which she stated that she was pregnant; that the following week end he again saw her, and she said she was not sure that she was pregnant. On July 26, 1949, she wrote him that she had a tumor; that he saw her about a week after he received the letter, but it was near the end of August, 1949, that she told him she was pregnant, and since then he had never lived with her or had sexual relations with her; that she gave birth to a child on December 1, 1949, but he never acknowledged the child as his or ever supported it. He further testified that on March 1, 1949, he was out of the territorial confines of the United States; that he left the United States early in February and did not return until the beginning of April, 1949, and was not in the United States between the time he left in February until he returned in April. He further testified that he first saw the child on December 16, 1949, when he stopped at the home of his wife on his way to Rockford on leave.

A certified copy of appellant's Marine Corps record was received in evidence, and it is to the effect that on February 13, 1949, appellant embarked on the Steamship Vermillion at Morehead City, North Carolina, which departed from

Morehead on February 18, 1949; that he arrived and disembarked at Vieques, Puerto Rico, on March 3, 1949; reembarked on March 15, 1949, and sailed from Vieques, Puerto Rico, on March 16, 1949, and arrived at Morehead City, North Carolina, on March 31 and disembarked on April 1, 1949.

Following the hearing on July 6, 1950, the court continued the cause to July 14, 1950. At that time appellant was again sworn and examined by the court. On July 6, 1950, it appears from the record, the court wrote to Maxwell Finkelman, the attorney of record for appellee, who lived at Middletown, Ohio. In his letter to Mr. Finkelman, the court advised Mr. Finkelman that he had continued the case until Friday, July 14th, and advised him what the testimony of the appellant had been. On July 7, 1950, Mr. Finkelman answered the trial judge, and this letter, over the objection of counsel for appellant, appears in the record as Court's Exhibit 1B and is as follows, viz.:-

MAXWELL FINKELMAN
Attorney and Counselor at Law
405 Savings and Loan Building
Middletown, Ohio

July 7, 1950

Hon. William R. Dasher,
Judge of the Circuit Court
Winnebago County Circuit Court
17th Judicial Circuit
Rockford, Illinois

Re: Reichstein vs. Reichstein
(William vs. One--58904)

Honorable Sir:

Thank you so very much for your letter of July 6 concerning the above entitled cause whereby you have continued the case until Friday July 14, 1950 at 3:00 P.M. At the time that I filed the answer in the above entitled cause, my client thought that she would be able to receive money to pay for counsel fees and expenses to defend her action. Soon thereafter she lost her employment and is without any money to appear and make defense. The truth of

the matter is that I have not been paid one cent for what work I have done in the case.

"However, it is my opinion that the testimony that the plaintiff allegedly gave to you was not true and I am enclosing herewith a letter sent by the plaintiff to the defendant on December 2, 1949, which letter is self-explanatory wherein the plaintiff refers to his 'son' and also on page marked No. 3 of the letter wherein the plaintiff writes as follows: 'So 'Mom' holds it against you for being here in March, not me, well 'good'. It was your fault, darling, but I love you very much, and will forever'. This paragraph puts the lie on the testimony of the plaintiff that he met the defendant for ^{first} time on June 11, 1949 and that he never had intercourse with her until after the marriage. This letter by the above statement admits that the defendant met and saw the plaintiff in March of 1949 and admits, in my opinion, the act of intercourse which, in my opinion, was the time when the child was conceived. From March to December is nine months which is the normal period of gestation.

"I am sending this letter to you to see what can be done so that an injustice will not be brought about because of the financial inability of the defendant to appear in person to offer evidence. I am sending you the original letter rather than a copy so that you will confront the plaintiff with it. I am requesting that you will be so kind as to send the same back to me for my client. Enclosed please find a letter sent me by my client. I have been unable to contact her and she does not know that I am sending the same to you. There may be a possibility, in the event that an annulment is granted, that this letter may help in the preparation of a bastardy action against the plaintiff for support of his child. Therefore, you must realize how important this letter is to my client. Please return the same as soon as possible.

"Inasmuch as you have been so kind and taken the trouble to write me personally, I feel that the only thing I can do is to send the information on hand to you. I know that it is the practice of every court not to allow any

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fraud to be practiced upon it especially where the rights of innocent, minor children are involved.

"Perhaps it might be in the best interest of all parties concerned that the deposition of my client be taken prior to final deposition of this cause, and I would be glad to cooperate in any way to see that such deposition is taken and filed notwithstanding the fact that no fees will be forthcoming.

"I wish to thank you again for the kind consideration that you have extended and for the fairness with which I know you will judge this matter, I am

Most appreciatively yours,

(Signed) Maxwell Finkelman
Maxwell Finkelman

MF:cvk
Encl. (2)"

The letter of appellee to her attorney and referred to in Mr. Finkelman's letter to Judge Dasher of July 7th, was marked Court's Exhibit 1-a and over counsel for appellant's objection appears in the record and is as follows:

July 2nd

"Dear Mr. Finkelman:

Due to Financial Difficulties I'm sorry to have to quit on the case, but it is a problem beyond my control. I will have no more chance in a year from now of raising enough money than I have right now. He will suffer as much as my baby or I will have to when he comes to his senses & knows that it is too late; & that he has lost his son. Please send me a statement of what I owe you & as soon as I find a job I will pay you. Also send my Decree & the Letter I gave you as I may need them in the future. Thanks for all your time & trouble.

(Signed) Sam Lee Reichstein

The other letter accompanying Mr. Findeman's letter to Judge Dasher was also marked as a court's exhibit and over the objection of counsel for appellant appears in the record. It is as follows:

Dec. 1, 1949
Thurs. even.

"My darling wife & sons,

Well, my sweet I received the good news at noon. I want to 'thank you,' baby for a 'son.' I'm certainly glad its over now, and hope you're in the best of health. Sam Lee, I love you so very much. I suppose you have named him already, cause I told 'em' its up to you all.

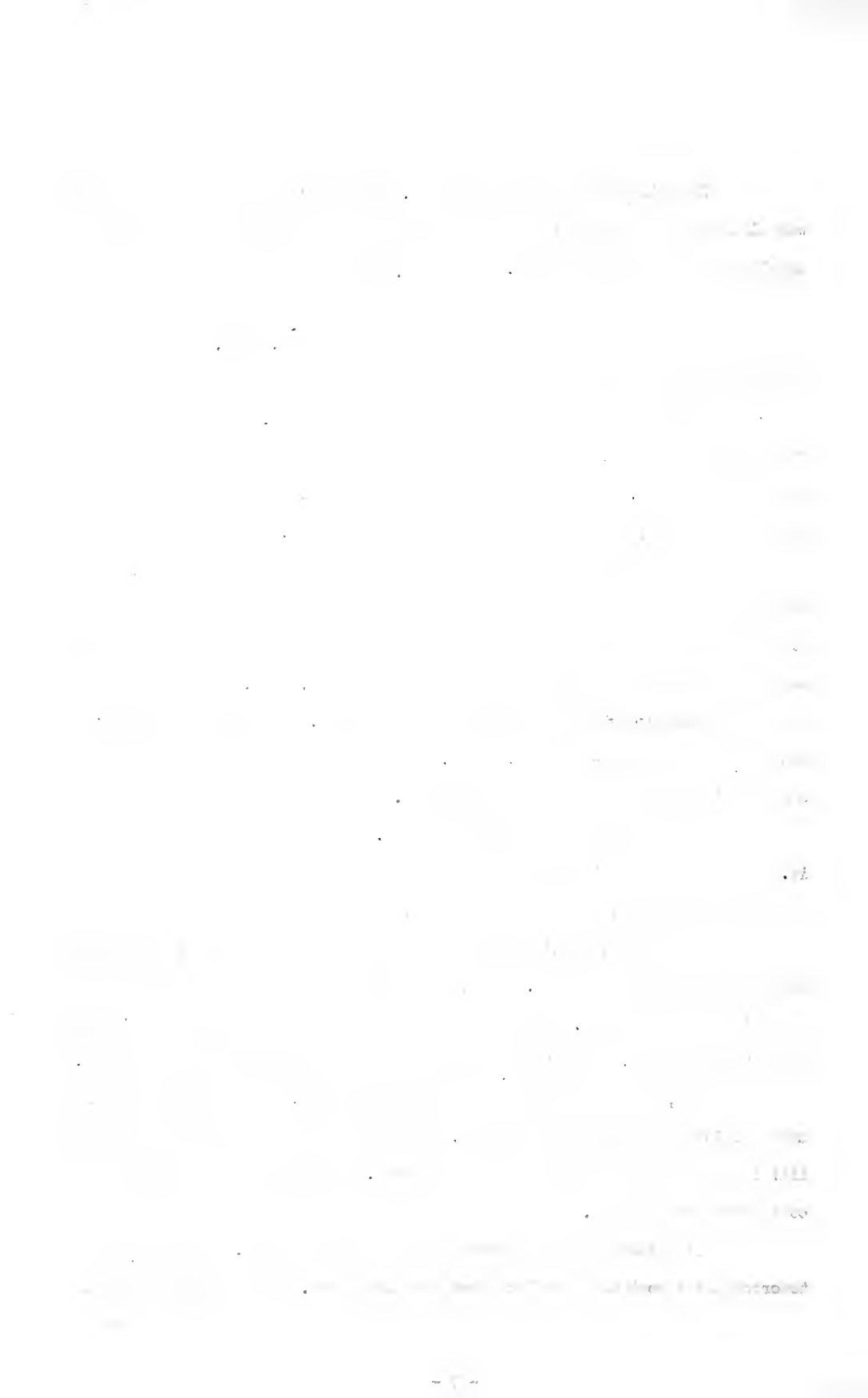
"I will try to get a few days after I return from rifle range. I should think I can be home for Xmas, but I can get a few days before. Things are all fouled up here, so I hope you'll understand about leave baby, I've got to see you all soon and now I'll be counting the days. Girl darling I'm 'hot to go' yet and sure will be glad when the time comes. We'll be careful from now on and use all pre-cautions. Gosh! darling we keep it up, we'll have a squad of 'marines,'簇拥ing every morning.

"Hon, I received your letter of Nov. 28th to day too so I'll answer it. You asked me questions in it that I can't answer like; 'if I'll come to you when you start labor, etc;' about the baby.

"By the way, darling write me the details about him name, weight, time etc so I can tell 'my friends. Gosh! its a — of a note, I don't even know my son's name or nothing. If, you get a birth certificate send it to me. I'll see about his allotment. I don't think I can get any more than, on this pay bill.

"Yes, I suppose Corbie is getting bigger now, and I will be with him enough raising him that he'll 'know me! Tell 'em' she can have him for awhile till I get a place or whenever you leave there. I love you baby and I wish I could have you here now.

"I'm sitting in the barracks now. I have the duty. I go to range tomorrow for a week then hon I can get few days leave. I seen Virgil after I



talked to 'Mom', boy! was he ever surprised you know, Grandma I don't think he even thought you were pregnant. Oh! well the world is full of surprises huh?— So, 'Mom' holds it against you for being here in war. not me, well 'good'. It was your fault, darling but I love you very much, and will forever.

"O-Kay! baby I'll see if I can get Corbie a tri-cycle for Xmas. It will be after Xmas before I get yours, baby, O-Kay! I hope 'Mom' will understand, but we'll get things straightened out someday.

"The folks, Carlene a little Rick are alright but its cold up there. They were down to house for Thanksgiving. About Now they are moving to Wash. D.C. Wally is getting transferred this next week and will be there for long time. Their daughter weighs 10 pounds now, she is about eight-9 yrs old.

"O-Kay! Ill put folks addresses at end of letter, but I dont know how O-K!

"Gosh! Jean has sort of lost her head, who does she fool? Ah! well guess she know's what the scoop is.

"Yes, Virgil has a friend with a 41 or 42 Chev. convert. I rode in it the other day. I don't know if he'll get home for Xmas or not, it depends on his friend.

"So, the 'X' is sending in money, every little bit counts. Hope they find him and get on his . . . about rest.

"Yes, Mom should get rid of the girls if Paul keeps up his 'stuff'. She does have headaches with them, etc. Tell her she can help us with our pair baby.

Well my sweet I'm going to close for tonight, sending a big yuletide for both of us. Hoping to hear from you, darling when you feel like writing. Take care of yourself and our sons. I love you, Grandma very much. Keep sweet for me forever and I'll see you in about ten or twelve days. Good night, baby.

Loving you Always,

Rich

P.S. Give my love to 'Mom.'
P.S.S. Folks address—
Carl E. R.
5821 Wilson Ave.
Rockford, Illinois"

Upon the hearing on July 14, the court called appellant to the witness stand, handed him the above letter dated December 1, 1949, and inquired of him whether it was in his handwriting. Over the objection of counsel for the appellant, the witness stated that it was. The court then inquired whether appellant had seen appellee in March, and he answered: "No, sir." The court then inquired: "What did you mention March for in your letter?" Appellant answered, "That is what she told her mother." The court continued its examination inquiring about various portions of the letter and its meaning over the objection of counsel for appellant, and, as abstracted, the following took place:

"Q. Why did you write that letter? A. I just received a phone call and sat down and wrote.

"Q. You received a phone call that this woman had borne you a son, is that right? A. Yes.

"Mr. Hays: I object to that.

"Q. And then you wrote this letter, is that right? A. That evening, yes sir.

"The Court: Well, I am going to ask him to pay enough to have a deposition taken or have this woman brought here and have a further hearing.

"Mr. Hays: I object to that. I don't think it is proper.

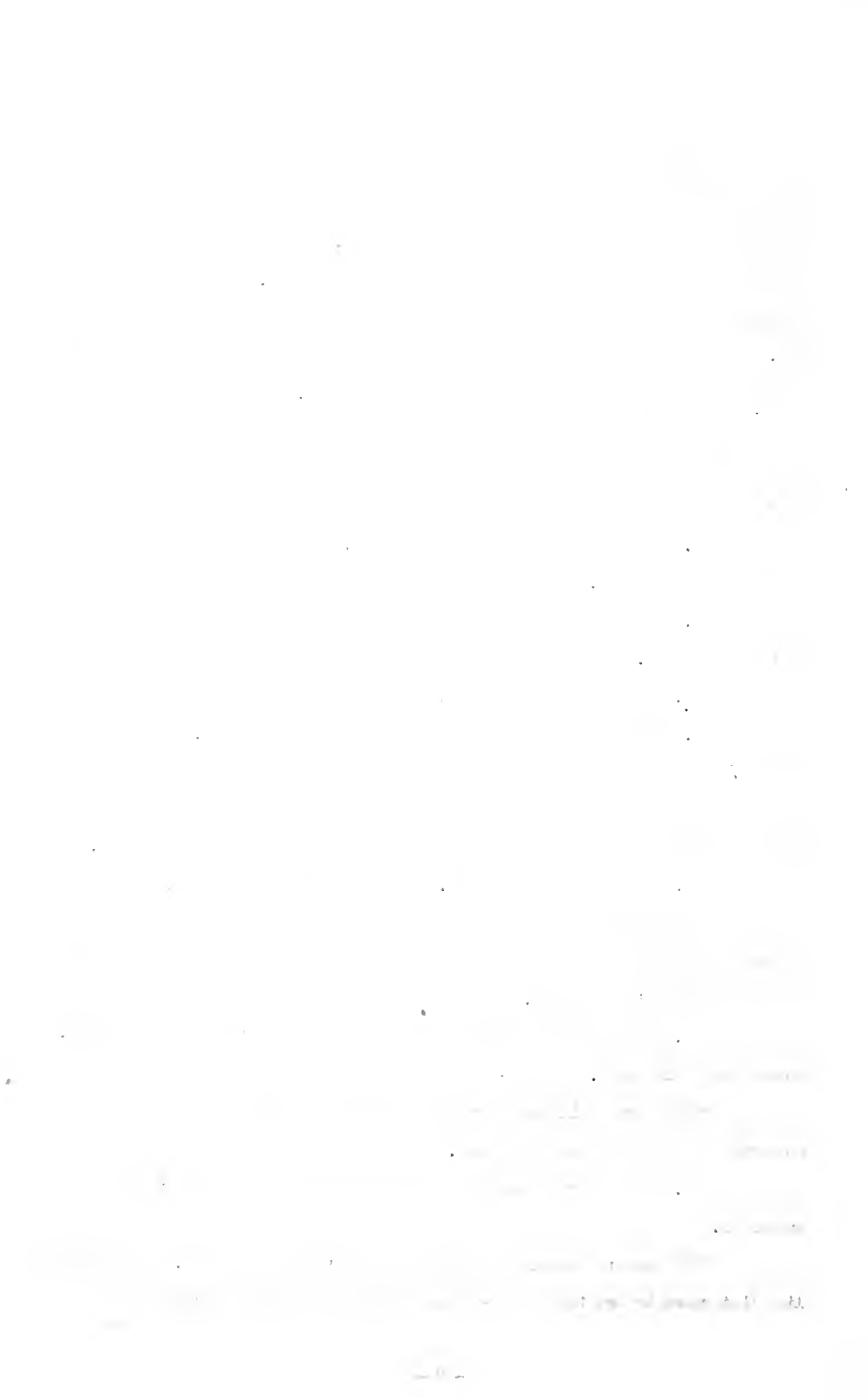
"The Court: This court isn't going to sit here simply helpless when he wrote a letter saying he had intercourse with this woman in March and he says now the child isn't his child.

"Mr. Hays: If the court please, the letter doesn't say he had intercourse with this woman.

"The Court: All right, you can have your own idea about it but I am not going to grant any annulment here.

"Mr. Hays: Then I would prefer the court deny the annulment and appeal it.

"The Court: I would be very happy to have you appeal it. When anything like that comes before the court -- when he writes this woman a letter and



acknowledges that child as his son and now he tries to get an annulment because it is not his son. Petition for annulment denied, if that is the way you want it.

"Mr. Mage: Yes, I do."

Counsel for appellant complains of the conduct of the trial court and in his argument states: "It is apparent that after the trial judge received the letter dated July 7th from Mr. Finkelman, he was constrained to disregard all of the positive evidence which had been introduced on the hearing on July 6, and to ignore the corroborative evidence of the plaintiff's Marine record and to ignore the laws of human procreation. It is apparent, too, that from the time the trial judge took this attitude, the plaintiff's rights were completely ignored and that the judgment of the trial court was prejudiced to the extent that any suggestion made by plaintiff's counsel was emphatically rejected. In taking into consideration this letter from Mr. Finkelman and the other letters which had been sent to him, the trial judge was taking into consideration matters which could not be properly placed in evidence. These letters were not produced by any of the parties during the course of the hearing, but they very evidently formed the basis of the court's judgment. Further, these letters were never introduced in evidence by the court, and it was not until plaintiff presented the Report of Proceedings for signature to the trial judge that the latter had two of the letters marked in any manner of identification, and two of the letters, Court's Exhibit 1A and 1B, had not previously been referred to in the record. Nevertheless, the trial judge refused to sign the report of proceedings until these letters were in it, even though plaintiff objected to their inclusion. . . . In this case the defendant made no effort to appear for the hearings; even though she was represented by counsel, no attempt was made to provide the court with her testimony, so that neither the Court nor counsel was given an opportunity to examine her under oath and to judge the credibility of her statements."

We recognize that the State is always an interested party in a proceeding of this character, but an examination of the record in this case



STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1851

General No. 9750.

Agenda No. 9.

LOUISE BENNETT.

Plaintiff-Appellee.

-VB-

RALPH BENNETT.

Defendant-Appellant.)

Appeal from Circuit

Court of Christian County.

344 I.A. 221

DADY, J:

Defendant Ralph Bennett has brought this appeal from a decree for separate maintenance entered by the Circuit Court of Christian County on May 5, 1950, in favor of his wife, Louise Bennett.

The contentions of the defendant are that the evidence did not justify any decree for separate maintenance, did not justify an allowance of \$250.00 per month for the wife's support, and did not justify an allowance to her of \$500.00 as attorney's fees.

Plaintiff and defendant were married on February 13, 1928, and lived together until February 28, 1950, when she left, and she has since remained away from the family home. At the time of the entry of the decree each was aged 51 years. They had three adult children who lived away from the parental home, and a minor son named James, aged 17, who lived at such home.

Plaintiff testified that until the last Christmas preceding the separation they had no difficulties other than little arguments,

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1931

Case No. 10,750

General No. 10,750

LOUIS BERNETT,
Plaintiff-Appellee,
-vs-
RALPH BERNETT,
Defendant-Appellant.

DADY, J.

Defendant Ralph Bennett has brought this appeal from a decree for separate maintenance entered by the Circuit Court of Christian County on May 5, 1929, in favor of his wife, Louise Bennett. The contents of the decree are that the evidence did not justify any decree for separate maintenance, did not justify an allowance of \$250.00 per month for the wife's support, and did not justify an allowance to her of \$500.00 as attorney's fees. Plaintiff and defendant were married on January 12, 1926, and lived together until February 28, 1930, when she left, and she has since remained away from the family home. At the time of the entry of the decree each was aged 31 years. They had three adult children who lived away from the parental home, and a minor son named James, aged 17, who lived at each home. Plaintiff testified that until the last Christmas preceding the separation they had no difficulties other than little arguments.

that after such last Christmas he did not "speak around the home," and did not say anything unless he scolded the kids, that prior to such Christmas it was his habit to stay home unless there was a farm bureau meeting, and did not leave at night without taking her, that after Christmas when he would go to a sale he would not come home early, that he never complained about the meals until the night before the separation, that on Christmas Eve when supper was ready he said he had to go and look at cattle at another place and did not come home until about twelve o'clock, that he said she didn't have to be asking why he was out late at night, and told her on two different occasions that she could get out, the first occasion being in January, that he came home one evening and sat on the davenport and she sat beside him and put her arms around him and he said, "You don't need to love me, there isn't any love coming from this way," and said the family was grown up and he didn't need her any more, and he would get her a home and place to stay if she would get out, and that she better get out right away, that he never spoke very much after that, that about a week after that conversation she tried to cheer him up, but he wanted to know how soon she would get out and wanted her to get out, that they had always occupied the same bed in the home, that on the evening of February 27th he left and came home about twelve o'clock, that she was up and waiting for him, and after he had gotten in bed she started to get in bed and he shoved her out, that he kicked her out, took his foot and shoved her out, and she slept on the davenport the rest of the night, that the next morning after breakfast and after the son James had left for school the defendant came in and said, "You took my change out

of my pocket last night, didn't you?", and she told him she never had taken any money out of his pocket, that he then shoved her in the living room and knocked her down on the davenport and "beat her up," striking her at least twelve times on the leg, that he "went to hit me in the stomach with his fist but he missed me and hit me on the other leg," that he kept on beating her until she finally said she had taken the change "to get out of there because I thought he was going to kill me, so I could get up," that he then stopped beating her and let her up, and she then left the home and went to the home of her friends, Mr. and Mrs. Daniels in Decatur, that as a result of such beating her leg was blue from the hip to the knee, and she showed such injuries to Mr. and Mrs. Daniels, that the reason she did not return to her home was because of his beating her up, and because he told her he would finish up on her if she was still there that evening when he came home.

Her testimony as to her alleged injuries was corroborated by the testimony of John DeClerk, John B. Daniels and his wife Lena Daniels. DeClerk testified that as a deputy sheriff he went to the home of defendant accompanied by the plaintiff and served a summons and injunction writ in the separate maintenance proceeding on the defendant, that on that occasion he said to the defendant, "Did you hit your wife or beat up on her or anything?", and that defendant then said, "No, all I done was paddle her ***."

Mr. Daniels testified that he and his wife live in Decatur 2-1/2 miles from the Bennett home, that he had known defendant practically all his life and had known the plaintiff for about fifteen years, that on February 28th he saw plaintiff when her son Bob brought her to the Daniels home where she then stayed two days,

that she was crying, that the next morning he noticed the side of her face was swollen and that one of her legs and hip was "all black and blue."

Mrs. Daniels testified that she had been in the Bennett home many times and the Bennetts had been in her home many times, that on February 28th the plaintiff's son brought plaintiff to the Daniels home, that plaintiff was then crying very bitterly and was very upset, that she then examined and saw the limbs of plaintiff were black and blue, and that plaintiff's face was swollen on one side.

Defendant testified that plaintiff was very jealous and had told him many times that he was chasing women, and they had had many altercations, that after Christmas 1949 there was an altercation between them approximately every evening when he came home, that she accused him of being out some place with some other woman or chasing some red heads, that he did not "as I recall" on any occasion tell the plaintiff that he was done with her, or that their family was grown and he did not need her, or that she had better get out and get out right away; that on the night of February 27th he got home about ten o'clock, that when he came in she said that if he would stay at home and quit chasing red heads he would get along at home, that he took off his work clothes and read the paper and then retired, that there was no other conversation between them, that he retired first and when she came in he told her she wasn't going to sleep with him in the same bed "after anything like that," that she tried to tear the bed covers off and went out of the room and did not get in bed that evening, and he did not kick

or push her out of bed, that before retiring he had folded up his clothes and left them in an arm chair in the living room, that at times he had noticed that he had lost change from his clothes and on this night he happened to count his change as he came into the house, that he had three half dollars, two quarters and two dimes, that the next morning he noticed his clothes had been mussed up, and when he counted his change he was short two quarters and two dimes but still had the three half dollars, that he didn't say anything until he got ready to leave that morning, when he asked her why she took the change out of his pocket, and she said she did not take it and called him a liar, and he slapped her face, and that she began to fight and he grabbed her by the wrists and sat her on the davenport, that she started to kick him and he turned her across his knee and spanked her, and she then said that if he would let her loose she would get the money, and she ran through the outer door and left the house, that later that morning she came back with their son Bob, but not into the house, that he did not at any time threaten her life and that other than slapping and spanking he never inflicted any violence upon her, and that he at no time told or asked her to leave or get out or that he did not need her any more or that the children were grown up.

The trial judge saw and heard such witnesses testify and was in a better position than we to tell who was telling the truth.

It is our opinion that we cannot properly hold that the trial court erred in entering a decree for separate maintenance.

On the subject of the allowance of support money, the defendant admitted that at the time of the trial he owned 496 acres of farm land in Christian County, subject to a mortgage of \$25,000,

or push her out of bed. That before retiring, he had folded up his clothes and laid them in an arm chair in the living room, that at times he had noticed that he had lost changed from his clothes and on this night he happened to count his change to his name three the house, that he had three half dollars, two quarters and two dimes, that the next morning he noticed his clothes and a pair of trousers, and when he counted his change he was about two quarters and two dimes but still had the other half dollars. That he didn't say anything until he got ready to leave and remember when he asked her why she took the change out of his pocket, she said she did not take it and called it a lie, and he slapped her face, and that she began to fight and he grabbed her by the wrists and sat her on theavenport, that she started to fight and he turned her across his knee and spanked her, and she then said that if he would let her loose and let her go, and she then she ran through the outer door and left the house, and later that morning she came back with their son, but not into the house, that he did not at any time threaten her life and that when she sleeping and spanking he never inflicted any violence upon her, and that he at no time told or asked her to leave or get out of the house he did not need her any more or that the children were grown up. The trial judge saw and heard enough witnesses to satisfy him that he was in a better position than he to tell who was telling the truth. It is our opinion that we cannot properly hold that the trial court erred in entering a decree for separate maintenance. On the subject of the allowance of support money, the defendant admitted that at the time of the trial he owed 480 acres of farm land in Christian County, subject to a mortgage of \$28,000.

that he borrowed \$48,000⁰⁰ when they bought the last 176 acres in September 1947 and had reduced that debt \$20,000⁰⁰ in the last year and a half, but that he had no idea as to his net worth.

Plaintiff testified that the home was a ten room modern house and that for sometime before leaving the home she had had the use of a new Buick automobile, that she had no money, and had had no occupation other than that of a housewife, that she was paying \$2.50 per day for room rent, and her meals cost from \$2.00 to \$3.00 per day.

John B. Daniels testified that he owned farm land in the same neighborhood, that in his opinion 320 acres of the Bennett land was worth from \$350⁰⁰ to \$400⁰⁰ per acre, and the remainder of such land was about one-half of that.

There was no evidence to the contrary as to the value of the Bennett lands.

It is our opinion that such evidence fully justified the trial court in making the allowance of \$250⁰⁰ per month as support money.

In Czarnecki v. Czarnecki, 341 Ill. 629, which was a divorce proceeding, that part of the decree awarding a divorce was affirmed, but the cause was otherwise reversed and remanded for further proceedings with reference to attorneys fees, because the record did not show that the court heard evidence and found that the fees allowed were the usual, reasonable and customary fees for the services rendered. (See Amberson v. Amberson, 349 Ill. 249.) In the present case no such evidence was presented.

that he borrowed \$18,000 when they bought the first car in September 1947 and had reduced that debt to \$10,000 in the last year and a half, but that he had no idea as to his net worth.

Plaintiff testified that the home was a very modern modern house and that for sometime before leaving the home she had had the use of a new Buick automobile, that she had no money, and had had no occupation other than that of a housewife, that she was paying \$2.50 per day for room rent, and her weekly cost from \$1.00 to \$1.50 per day.

John E. Harnish testified that he owned 100 acres of the same neighborhood, that in his opinion 100 acres of the same land was worth from \$150⁰⁰ to \$200⁰⁰, and that the plaintiff's such land was about one-half of that.

There was no evidence to the contrary as to the value of the Bennett lands.

It is our opinion that such evidence fully justified the trial court in making the allowance of \$200⁰⁰ per month as support money.

In Quarbeck v. Quarbeck, 441 Ill. 498, which was a divorce proceeding, that part of the decree awarding a divorce was affirmed, but the cases was otherwise reversed and remanded for further proceedings with reference to attorney fees, because the record did not show that the court heard evidence and found that the fees allowed were the usual, reasonable and customary fees for the services rendered. (See Amberman v. Amberman, 349 Ill. 242.) In the present case no such evidence was presented.

That portion of the decree in the present case granting the plaintiff a decree of separate maintenance and the allowance of support money is affirmed. That part of such decree allowing attorney's fees is reversed, and the cause is remanded to the trial court for further proceedings with reference to the allowance of attorney's fees.

All costs will be taxed against defendant.

Affirmed in part but reversed and
remanded in part for further
proceedings.

That portion of the decree in the present case providing for

plaintiff's decree of separate maintenance and the allowance of

support money is affirmed. That part of such decree allowing

attorney's fees is reversed, and the same is awarded to the

trial court for further proceedings with reference to the same

of attorney's fees.

All costs will be taxed against defendant.

Witness my hand and seal of office at St. Louis, Missouri,

this 10th day of June, 1907.

Very truly yours,

45366

MILDRED F. HALLA,
Appellee,

v.

CHICAGO TITLE & TRUST CO., as
Trustee under Trust #33369, and
PAUL SCHOFIELD,
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

344 I.A. 2 6¹

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to set aside for fraud respecting the applicability of Rent Control regulations, a sale of real estate. The chancellor entered a decree in plaintiff's favor and defendant Schofield has appealed.

The property subject of the sale was located at 2124 Cleveland Avenue, Chicago, Illinois. A three story family residence was on the land. In May 1946 title was conveyed to the Chicago Title and Trust Company as trustee under a land trust with defendant Schofield as sole beneficiary. The house thereafter was converted into a five unit building; one unit was on the first, two on the second, and two on the third, floor. On May 14, 1947, Schofield advertised the premises for sale. At the time the four upper story units were occupied under leases made in January 1947 for periods commencing February 1st.

In response to the advertisement plaintiff, on August 13, 1947, signed a contract to purchase the property. August 28th the deal was closed. The price was \$28,000,

\$16,000 in cash and the balance by purchase money mortgage. December 9, 1947, the Chief Area Rent Attorney gave his opinion that the premises were not exempt from rent control. As a consequence the gross monthly rental from the four units was reduced from \$465 and brought under a ceiling of \$235 per month. Plaintiff demanded a rescission of the sale, and, upon refusal of the demand, began this suit.

The issue made by the pleadings was whether plaintiff was induced to make the purchase through Schofield's false representations that the premises were being used for commercial purposes and that the conversion from a single dwelling was made after February 1, 1947, so as to free the property from rent control. The pertinent findings of the chancellor were that Schofield made the false representations knowing them to be false; that plaintiff relied on the representations and was induced thereby to make the purchase; and that the decree was based on tort with malice the gist of the action. He declared the contract of sale void and cancelled it, ordered the mortgage cancelled, ordered plaintiff to quitclaim her interest to Schofield upon receiving the sums due her as shown by an accounting by Schofield and ordered that plaintiff recover from Schofield attorney's fees and expenses incurred in making proof of facts which defendant improperly refused to admit.

The parties agree that plaintiff had the burden of proving the alleged fraud by clear and convincing testimony.

Defendant contends that plaintiff did not make the required proof of the alleged misrepresentations. ✓

Testimony in behalf of plaintiff is to the effect that defendant and his attorney falsely stated that the tenants used the premises for commercial purposes; that the residence was converted into units after February 1, 1947; and that for these reasons the premises were not subject to rent control and the rents being collected were justified. Testimony for defendant was to the contrary. We neednot decide questions based upon these issues of fact. Even if the statements were made and were false, we think plaintiff was not entitled to rely upon them as inducements to make the sale. }

Plaintiff admits inspecting the premises four or five times before making the purchase. She visited most of the units. The only object she saw which she considered evidence of commercial use was a typewriter and stand. The fact that the lease she saw provided for predominantly commercial use or that defendant told her not to discuss with the tenants their use of the units does not alter our opinion. What her inspection showed was plain enough for a reasonable person. She was put on notice that the units were used as dwellings. This conclusion applies to alleged related statements that the Housing Expediter did not question the decontrollability of the property and that there were no proceedings pending. Plaintiff was represented by an attorney. He made provision in the contract X

for a period within which to determine the status of the premises under the Housing and Rent Act. Under this provision plaintiff was entitled to withdraw from the contract should it be shown to "seller's satisfaction" that for any reason the premises fail to fall within the provisions of sub-section (8) of section 1 of the Rent Regulations promulgated under the Housing and Rent Act as amended in 1947. Neither plaintiff nor her attorney was entitled to rely solely upon statements the opportunity for investigation of which was provided for and open to them.

So far as the foregoing representations are concerned, plaintiff and her attorney had sufficient knowledge of facts to be put on guard as to the commercial use and had ample opportunity to ascertain the truth as to the status of the premises under the Housing and Rent Act and, accordingly, had no right to rely upon the representations. Bundesen v. Lewis, 368 Ill. 623. We think this conclusion is consistent with the decisions in Roda v. Berko, 401 Ill. 335, and Gilbey v. Hamlin, 297 Ill. 258, cited by plaintiff. In these cases there were not facts observed by plaintiffs which cast suspicion upon the truth of the alleged misrepresentations.

The record shows that defendant represented that the conversion from the single to the multiple dwelling units was made after February 1, 1947. Sec. 1 (b) (8) provided for decontrolling of, among other things, "additional housing accommodations created by conversion on or after February 1,

1947". The contractor certified that his work was finished April 1. Defendant still insist that this representation is true. The letter from the contractor was not false. It was incorrectly interpreted. We think that there might be room for difference of opinion on the question. There is no dispute that the contractor's work was not completed before February 1, 1947. The question of when conversion was effected, therefore, is one of law about which a false representation does not ordinarily render one liable.

Bundeson v. Lewis, 368 Ill. 623.

There is one important fact, however, which we think is favorable to plaintiff. There was a conflict in the testimony on the question whether the representation was made on behalf of defendant that the tenants moved into the units after February 1, 1947. We think the chancellor was justified in deciding that this representation was made, was material, and that it was false. The record shows that three units were occupied during January and that defendant was paid for the occupancy. The truth on this matter might have weighed heavily in plaintiff's, or her lawyer's, judgment on the question of law. A prudent person would probably decide that occupancy by several tenants of several units was strong evidence of conversion from a single unit.

A hearing was had before the Housing Expediter after the sale was consummated. Plaintiff's attorney had notice of the hearing held in September. We infer from the record

and statements during oral argument that he attended the hearing. We infer from the record that testimony before the Expediter showed the January occupancy. This was notice of that fact to plaintiff through her attorney. Instead of demanding rescission she awaited the decision of the Housing Expediter. Presumably she would not have sought rescission if the premises were not brought under control.

Plaintiff, therefore, with knowledge of the important fact in September, waited about a month after the Housing Expediter's opinion in December before demanding rescission. She says that in the interim she was not speculating on a favorable decision but was giving defendant a chance to establish the "truth" of the representation. The "truth" she refers to is the final decision on the question of law by the Housing Expediter under the Housing and Rent Act. She learned in September the important fact which she claims was withheld and which, had it been known, would have prevented the sale. We think that plaintiff is precluded from rescission because of our conclusion that she speculated and was willing to overlook the alleged fraud if the decision of the Housing Expediter was in her favor. Crawford Corp. v. Woodlawn Bank, 382 Ill. 354; Greenwood v. Fenn et al., 136 Ill. 146; 3 Pomeroy's Eq. Jur. §897, p. 530.

Defendant did not waive this point because of his letter rejecting plaintiff's demand for rescission. The letter denied fraud and stated plaintiff had all the available facts before the sale. There is no showing made by

her that she could or would be in a different position had defendant added to his letter the statement that, even if plaintiff had not all the facts before the sale, she had all the facts at the September hearing and yet made no demand for rescission until after the December decision of the Expediter. We think testimony for plaintiff plainly shows that she was in nowise prejudiced by the failure of defendant to state the additional ground in his letter.

In the decree the trial court ordered that plaintiff should recover of defendant \$119.90 for fees and expenses required to prove facts defendant improperly refused to admit pursuant to notice and demand under Supreme Court Rule 18 (2). No showing is made by defendant why this part of the decree should not stand.

For the reasons given the decree, insofar as it allows fees and expenses under Rule 18 (2), is affirmed and in all other respects is reversed and the cause remanded with directions to dismiss the cause for want of equity.

DECREE AFFIRMED IN PART: REVERSED
IN PART AND CAUSE REMANDED WITH
DIRECTIONS.

LEWE, J., CONCURS.
FEINBERG, J., TOOK NO PART.

2268
Abstract

Gen. No. 10454

Agenda No. 14

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1950

JOSEPH CABONARGI,
Plaintiff-Appellant,
vs.
EDWARD J. JORDAN, JR.,
Defendant-Appellee.

344 I.A. 2 6²
APPEAL FROM THE
COUNTY COURT OF
LAKE COUNTY.

Dove, J.

This is an appeal by the plaintiff, Joseph Cabonargi, from a judgment in his favor for \$500.00 rendered by the County Court of Lake County on a verdict of a jury against Edward J. Jordan, Jr.

The plaintiff in his complaint sought to recover the sum of \$1982.67 against the defendant for work, labor and materials furnished the defendant in connection with the construction by the plaintiff for the defendant of what is referred to in the record as a shell house. The contract price for the work, labor and materials for the construction of this house was \$11,970.00, which sum included a 15% commission to the plaintiff, the contractor, for profit and overhead expenses.

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The complaint alleged that the plaintiff had performed all of the work, labor and services, and supplied the goods, wares and materials required under said contract, but that he had not been paid in full for so doing; that he had been paid the sum of \$10,878.60 on said contract, which sum was \$1091.40 less than the agreed contract price; that in addition to all of the matters covered by the contract, he supplied certain extras, at the direction of the defendant, which extras amounted to the sum of \$891.27, which brought the total due to the plaintiff to \$1982.67; that he had actually expended the sum of \$14,068.22 in and about the performance of his contract to build the shell house for the plaintiff, but that the charges for his services were limited by the contract to the maximum base price therein established of \$11,970.00. Attached to the complaint was a copy of the contract.

The defendant, by his answer, denied that he owed the plaintiff anything and further alleged that the defendant's work was not done in a good and workmanlike manner and was not satisfactory. Defendant also filed a counterclaim for damages sustained by him because the work done by the plaintiff was done in such an improper, unworkmanlike and defective manner so as to necessitate the expenditure by the defendant of \$2071.00, for which amount he demanded judgment against the plaintiff.

The record discloses that on May 20, 1948, the parties entered into a written agreement for the construction of this dwelling house, the pertinent provisions of which are as follows:

The Commission of the European Communities (CEC) has been established by the Treaty of Rome, which entered into force on 1 January 1958. The CEC is responsible for the implementation of the common policies of the Community, particularly in the fields of agriculture, transport, and regional development. It also manages the Community's budget and ensures the proper functioning of the internal market. The CEC is composed of representatives from the member states, and its decisions are binding on all member states. The CEC has played a crucial role in the development of the European Union, and its work continues to be essential for the future of the Community.

Contract Agreement

THIS AGREEMENT, made this 20th day of May A.D. 1948, by and between Joseph Cabonargi hereinafter called the Contractor and Edward J. Jordan, Jr. hereinafter called the Owner.

For the consideration hereinafter named, the said Contractor covenants and agrees with the said Owner as follows:

First. The Contractor shall and will furnish, construct, set in place, finish and deliver to the Owner, free from all claims, liens and charges, and in a good substantial, thorough and workmanlike manner perform and in every respect complete

EXCAVATION:

All concrete work including pump house and floors, all steel work, stone and block walls, all outside frame work, roof and roofing, inside bearing partitions, all glass block as shown on plan.

EXCEPTIONS:

No plumbing except tiles around footings, no electrical work, no painting, no plastering, no sheet metal, no frames and sash, no millwork, no stairs, no hardware, no doors, no inside work except bearing partitions, no insulation.

The chimney to be of Lannon stone, the end walls to be of 6" block, the front and rear walls to be of wood construction partly plastered and partly finished with vertical redwood siding. The roof to be of flat composition roofing. The basement windows areas to be half round galvanized metal. - - -

The owner will act as his own architect and to the full satisfaction of said Architect. - - -

Third. The Contractor will furnish said materials, including all necessary scaffolding, and prosecute said work with due diligence, - - -

Fourth. The Contractor shall, from time to time, as directed by the Architect, remove all debris, dust and rubbish incidental to or resulting from said Contractor's work; and shall upon completion of the work required by this Agreement, remove all scaffolds, material, machinery, implements, debris, rubbish and dust connected with, incidental to, or resulting from said work, and leave said work and the premises clean, neat, complete and perfect, without any cost or expense in that behalf to the Owner. — — — — —

Thirteenth. It is expressly UNDERSTOOD AND AGREED by and between the parties hereto that time is and shall be considered the essence of the contract on the part of the said Contractor, - - - -

Fourteenth. The Contractor shall prosecute the work diligently to completion, and shall complete the several portions, and the whole of work comprehended in this Agreement, by and at the time or times hereinafter stated, to-wit: The cost to the owner shall be the cost of labor and material plus fifteen percent (15%) of the cost of labor and material as the contractor's commission. The maximum price is stated below. Labor to include taxes and insurance. Should the cost be less than the maximum the difference will be equally divided between the owner and the contractor. The contractor must have time sheets in duplicate and signed by owner and will be responsible for costs based on signed time sheets. Hourly rates are as follows: Bricklayer and stone mason \$2.25 Hr. Carpenter \$2.15 Hr. Laborer \$1.60 Hr. Should the wages and material increase subsequent to the date of this contract the contract price will increase accordingly. Should the above work not be completed by May 20th, 1949, the

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owner has the option to cancel this contract. - - -

IN CONSIDERATION WHEREOF, the said Owner agrees that he will pay to the said Contractor, in monthly payments, the sum of \$11,970.00 for said materials and work, said amount to be paid as follows: Ninety per cent (90%) of all labor and material, or both, on the premises, to be paid on or about the tenth of the following month, except the last payment, which the said Owner shall pay to said Contractor within thirty days after said materials and labor installed by said Contractor have been completed and approved by the said Architect.

It is further understood and agreed that no payment on account shall operate as an approval of said work or materials or any part thereof.

IN WITNESS WHEREOF, they have executed this agreement the day and date written above.

JOSEPH CABONARGI

Contractor.

EDWARD J. JORDAN, JR.

Owner.

Numerous assignments of error are made by appellant but as presented in his brief and argument his contentions fall into the following classifications: (1) That the court erred in admitting in evidence certain photographs of the house in question offered by the defendant; (2) that the court erred in its interpretation of construction of certain provisions of the contract entered into between plaintiff and defendant; (3) that the court erred in the giving and refusing of certain instructions; and (4) that the verdict of the jury is grossly inadequate and contrary to the manifest weight of the evidence.

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At the hearing the defendant introduced in evidence a number of photographs which he took of the house being erected for him by the plaintiff. Defendant's testimony is that he is an amateur photographer and took and developed these pictures himself. The photographs were all small in size and appear to be either out of focus or not properly developed or distorted. There is no testimony in the record that these photographs are true and correct representations of the subject matter which they purported to portray. They were objected to by plaintiff on the ground that they were not true and correct likenesses of the subject matter which they purported to represent. This objection is equivalent to objecting on the ground that the photographs did not truly and correctly portray the subject matter they purported to represent. As we view it, no proper foundation was laid for the introduction of these photographs in evidence, and it was error to admit them. From the study that we have made of these pictures, it is our opinion that they were of little assistance to the jury in arriving at a proper result in this case and that it would not have been error on the part of the court to have refused to admit them even if a proper foundation had been laid for their introduction. In C.C.C. & St. L. Ry. Co. v. Monahan, 140 Ill. 474 at 483, in discussing the admission of certain photographs in that case, the court said: "It is also ~~also~~^{urged} as a ground of reversal, that the trial court refused to admit in evidence certain photographic ~~pictures~~^{views} of the locality where the accident occurred, and its surroundings. There are authorities which hold, that photographs may be received in evidence, under certain circumstances, to

assist the jury in understanding the case, provided they are verified by proof as being true representations of the subject. In the present case, each photograph was taken two months after the accident occurred by a merchant, who was a mere amateur photographer, and had never visited the scene of the occurrence before he took the photographs."

In *Grant vs. Northwestern R. R. Co.*, 176 Ill. App. 292, it was held not to be error to exclude photographs taken by a photographer shown to be inexperienced. If a photograph is inaccurate, distorted, or misleading, or taken at a time when the situation has changed, it should be rejected. (*Chicago & A. R. Co. vs. Corson*, 198 Ill. 98.)

Appellant also contends that the court erred in permitting the introduction by the defendant of certain testimony relative to whether or not the plaintiff was required under the contract to do any plastering or stucco work on the house. A great deal of testimony was offered and admitted at the hearing with reference to the controversy concerning the plaster or stucco work required to be done on the house. Appellant insists that under the exceptions contained in the contract that plastering was expressly excepted, while appellee asserts that the provision in the contract "the front and rear walls to be of wood construction partly plastered and partly finished with vertical redwood siding" required the plaintiff to plaster or stucco a portion of the front wall. Upon the trial the court, in connection with admitting some evidence in connection with plastering or stuccoing the front wall, stated: "Well, there is a dispute in this contract, as to whether he was to stucco these particular parts of the building that are under

assisted in the investigation of the case, and the results of the investigation were verified by the fact that the same results were obtained in the laboratory. The results of the investigation were verified by the fact that the same results were obtained in the laboratory.

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discussion here, and I think I should leave that to the jury." Notwithstanding the foregoing ruling, the court gave, at the request of appellee, the following instruction: "Under the terms of the contract in question, the front wall of the building in question was to be partly plastered and partly finished with vertical redwood siding. If you believe from the evidence in this case that the plaintiff did not partly plaster said front wall, but that the defendant had someone else plaster it, then said defendant would be entitled to a credit, and you should deduct the fair, reasonable and customary cost of plastering said front wall from the amount, if any, that you would otherwise find the plaintiff entitled to recover herein." This instruction conflicts with the court's ruling on the admissibility of the evidence pertaining to the plaster or stucco work, and even though the verdict of the jury is in favor of the plaintiff, we are unable to say that the plaintiff's case was not prejudiced by such a conflict, even though the plastering and stucco item involved only \$95.00.

In Webster's Universal Unabridged Dictionary, plaster is defined as "A composition of lime, water, and sand, with or without hair for binding, well mixed into a kind of paste, and used for coating walls and partitions of houses, and for various other purposes." Stucco is defined in the same dictionary as "Plaster of any kind used as a coating for walls" and as "A fine plaster composed of lime or gypsum with sand and pounded marble, used for internal decorations." The defendant's testimony was that he directed the plaintiff to stucco that portion of the wall in controversy and that the plaintiff refused because stucco work was plastering, and was, therefore, excepted under the

contract from any work that he was to perform on defendant's house. The general rule is that the interpretation and construction of the language of a contract is a matter to be determined by the court and that only controverted questions of facts are to be submitted to the jury for decision. (6 R.C.L.862.) We see no reason why this generally accepted rule should not be followed here. The construction and interpretation of this contract is to be determined by the court and not submitted to the jury as a controverted question of fact. From our study of this contract, we have come to the conclusion that appellant's construction is correct and that the plaintiff was not required to do any plastering or stucco work on defendant's house. Our conclusion is based on the fact that plastering was expressly excepted in the exceptions contained in the contract and for the further reason that the hourly wage rates were specifically set out in the contract for all of the other workmen connected with this project except the plasterer. While it is true that the contract recites that the front and rear walls were to be partly plastered and partly finished with vertical redwood siding, we do not believe that this is sufficient to overcome the express typewritten exception of plastering from the remainder of the contract.

As appears from the abstract, the court gave 19 instructions, 16 on behalf of defendant and 3 on behalf of plaintiff. Appellant first complains that it was error on the part of the court to give so many instructions on behalf of the defendant which were peremptory in nature. Eight of the instructions given on behalf of the defendant ended with the language "Then you

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

FOR THE YEAR 1890

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF COMMONS

PASSED ON THE 12TH MARCH 1890

AND IN ANSWER TO A QUESTION ASKED BY MR. ST. JOHN

STEELE

ON THE 12TH MARCH 1890

BY MR. ST. JOHN STEELE

ON THE 12TH MARCH 1890

IN ANSWER TO A QUESTION ASKED BY MR. ST. JOHN

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BY MR. ST. JOHN STEELE

ON THE 12TH MARCH 1890

IN ANSWER TO A QUESTION ASKED BY MR. ST. JOHN

STEELE

shall find the issues for the defendant" or "the plaintiff cannot recover " may well indicate to the jury that the court favors the defendant's side of the controversy and thus operate to the prejudice of the plaintiff. It was error to give so many such instructions. (Daubach vs. Drake Hotel Co., 243 Ill. App. 298,304; Nelson vs. Chicago City Ry. Co., 163 Ill. App. 98,102; Wood vs. Illinois Cent. R. Co., 185 Ill. App. 180,184.)

Instruction No. 12 told the jury, in substance, that it was the duty of the plaintiff to remove all debris, dust and rubbish incidental to or resulting from said contractor's work. Instruction No. 13 told the jury that if the plaintiff did not remove all of the debris, dust and rubbish incidental to the work in question but that the defendant removed all of said debris, dust and rubbish, then the defendant was entitled to a credit against the account of the plaintiff for the value of his work in removing said debris, dust and rubbish. These instructions are somewhat confusing and contradictory, as in No. 12 the plaintiff was required to remove all of the debris resulting from his work, while in No. 13 he was required to remove all of the debris, dust and rubbish without regard to whose work caused the same. While this item also involves only a small amount of the actual sum in controversy, it tended to place the plaintiff in an unfavorable light before the jury. By the fourth provision of the contract entered into between these parties, the plaintiff was only required to remove the dust, debris and rubbish resulting from his own work.

The plaintiff also asserts that the court erred in giving Instruction No. 14, which told the jury that the scaffolding employed on the job by the plaintiff and charged to the defendant and later removed from the premises by the plaintiff should be credited against the maximum price as fixed by

the contract. We perceive no error in the giving of this instruction. It is our opinion that the defendant was entitled to a credit for any scaffolding charged against him and later removed from the premises by the plaintiff, and that such sum should be properly credited against the maximum figure allowed by the contract and not the actual expenditure made by the plaintiff as he contends. Nor do we find any error in the giving by the court of Instruction No. 2, pertaining to the Mechanic's Lien Act of the State of Illinois as the same appears in paragraph five of Chapter 82 of the Illinois Revised Statutes, which paragraph provides in substance that it shall be the duty of the contractor to give the owner before the owner shall pay the contractor a verified statement of the names of all parties furnishing materials and labor on the project in question. Under the facts adduced at the hearing, such an instruction was proper. We have examined the other instructions which the plaintiff asserts the court erred in giving or refusing, but find no error in the court's disposition thereof.

This brings us to the final argument of the plaintiff that the verdict of the jury is grossly inadequate and contrary to the manifest weight of the evidence. Before the case was submitted to the jury, the defendant admitted an extra item in the sum of \$370.70, which was not included in the maximum price allowed by the contract and which was increased wages as provided for in said contract. He also admitted another extra item before the cause was submitted to the jury in the sum of \$105.60 for nailing strips under the concrete joists. These two items total \$476.30. The verdict of the jury was for \$500.00 or \$23.70 over and above the admitted extras. The basic contract

price was \$11,970.00, upon which the defendant had paid \$10,878.60, leaving a deficit of \$1,091.40. In addition to the extras admitted, the plaintiff claimed additional extras, as shown by plaintiff's Exhibits 16 and 17, in the approximate sum of \$400.00.

After a careful study of the record in this case, we find no basis upon which the jury could conclude that the plaintiff was only entitled to recover \$23.70 above what both parties agreed were due him. ~~There is especially no basis in view of the fact that the jury found the first form of verdict submitted to it to be correct.~~ No useful purpose could be served by our reviewing in this opinion the voluminous testimony offered in the five days consumed by the trial of this cause. From our study of the evidence submitted, we believe the verdict of the jury is against the manifest weight of the evidence, and it is the duty of this court to reverse the judgment and remand the cause for a new trial. (Donelson vs. E. St. Louis & S. R. Co., 235 Ill. 625; Baumeister vs. Bowers, 271 Ill. App. 332; Mahoney v. Alton Light Power Co., 275 Ill. App. 208; Rhoden vs. Peoria Creamery Co., 278 Ill. App. 452; Valent vs. The Metropolitan Ins. Co., 302 Ill. App. 196.)

Upon the trial of this case, the court submitted to the jury four forms of verdict, the first one being: "If the jury believe from the evidence that the plaintiff is entitled to recover in this case, the jury should find for the plaintiff the amount of such recovery and the form of your verdict may be: 'We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of _____ dollars. (writing in the blank space the amount of damages, if any, as found by you from the evidence)'" The other three forms of verdict were to the

effect that if the jury believed that the defendant had suffered any damage because of any default or want of care or skill on the part of the plaintiff in performing his contract, the jury should deduct that amount from such sum as the jury believed the plaintiff was entitled to, if any, and find their verdict accordingly. The jury returned the first of us, only one since the damages of the plaintiff at \$60.00. Evidently, the jury did not believe that defendant sustained any loss because of any default or neglect on the part of the plaintiff in his performance of the contract. Under all the facts disclosed by this record, we believe the issues in this case should be submitted to another jury.

The judgment of the County Court at San Antonio is therefore reversed and this cause is remanded to that court for a new trial.

Reversed and remanded.

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Abstract

Gen. No. 10496.

Agenda No. 7.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1951.

344 I.A. 277

DAVID WIEREMA and ALICE WIEREMA,)
Plaintiffs-Appellants,)
vs.)
ILLINOIS NORTHERN UTILITIES COMPA-)
NY, a Corporation,)
Defendant-Appellee.)

Appeal from the
Circuit Court of
Whiteside County.

WOLFE,-- P. J.

On August 11, 1950, David Wierema and Alice Wierema filed a suit in the Circuit Court of Whiteside County, against the Illinois Northern Utilities Company claiming that they had been damaged by the negligence of the defendant, because their house and contents had been burned. The complaint alleges that on or about the 16th day of April 1950, the plaintiffs were the owners of and in possession of a farm house located in the Township of Hume, Whiteside County, Illinois; that the defendant, Utilities Company, was engaged in the business of supplying electricity and power in said County, and were supplying the plaintiffs with electricity on said date; that on or about the 16th day of April, 1950, a sleet storm occurred in the locality of their home, and as a result thereof, the wires and equipment of the defendant broke down and were disconnected and not fit for use, and that a part of the damaged equipment was a meter on the house of plaintiff, which meter and wires were in the exclusive

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possession and owned by the defendant in the case; that on or about the 16th or 17th day of April 1950, that said electric current of the home of the plaintiffs was totally disconnected, owing to the breakage of the wires and equipment; that said equipment was in such condition that it was unsafe to turn on the electric current in the home of the plaintiffs; that said condition was known, or should have been known to the defendant; that said defendant, without proper investigation, and with no notice to the plaintiffs, on or about the 18th day of April 1950, at 11:30 p.m. turned on the electric current at the home of the plaintiffs, and due to the defective equipment of the defendant, said wires or instruments created a short circuit and started a fire in the home of the plaintiffs; that before the electric current was turned on at the home of the plaintiffs, it was the duty of the defendant to investigate and examine said equipment to ascertain whether or not it was safe to turn on the current; that as a result of the fire, the house and contents were totally destroyed. The plaintiffs asked damages in the smount of \$13,500.00.

The defendant filed an answer and admitted that the plaintiffs own the house in question, and that they are engaged in the business of supplying electricity to people in that neighborhood. All the other allegations in the complaint they deny.

The case was submitted to a jury and the plaintiffs introduced evidence to sustain their complaint. At the conclusion of the evidence, the defendant asked for a directed verdict in their favor. This motion was denied and the case submitted to the jury that found the defendant guilty, and assessed plaintiffs'

The case was submitted to a jury which introduced evidence to rebut the defendant's contention of the alibi, the defendant called for a directed verdict in their favor. This motion was denied and the case submitted to the jury that found the defendant guilty, and assessed plaintiff's damages at \$10,000.

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damages in the sum of \$11,000.00.

The defendant entered a motion for judgment notwithstanding the verdict, and an alternate motion for a new trial. The Court granted the motion for judgment notwithstanding the verdict, and entered judgment accordingly. The judgment order also states that in the event that the judgment notwithstanding the verdict should be reversed, or set aside, that then the defendant would be entitled to a new trial. It is from this judgment that the appeal has been prosecuted to this Court.

It is a well settled rule of law that in a case of this kind if there is any evidence at all to support the verdict of the jury, the trial Court should not set aside the verdict and render a judgment in favor of the defendant. In this case it then becomes a question of fact whether there is any competent evidence in this record to support the findings of the jury. The facts in the case are not in dispute, as the defendant offered no evidence at all, and rested its case solely upon the evidence produced by the plaintiffs. There is no dispute that the Utilities Company owned the wires running from the main line in the road, to the house of the plaintiffs, and that the wires were connected to the house about eighteen feet from the ground; that heavy wires or cables then connected with a meter box, which was about twelve feet below where the wires were fastened to the house; that these wires and the meter box, it is admitted were the property of the Utilities Company. Wires then were connected to the meter box and carried to the cellar of the house and connected there with a fuse box. These wires and the fuse box were the property of and under the control of the plaintiffs. The fire started not in the meter box on the outside of the house owned by the Utilities Company, but in the cellar of plaintiffs' home, at or near the

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fuse box, which according to plaintiffs' testimony they owned.

It will be observed that the plaintiffs alleged that the wires leading from the road to their home were broken. On Page 76 of the record this question was asked the witness, David Wierema. "Did you observe at any time whether or not the wires were broken between the transformer and the house? I am including all the wires that were down, the Company wires and your wires, the wires out in the yard, were any of them broken?" Answer, "No." "By that, that includes of course the meter; they were still connected with the meter?" Answer, "Yes." "Everything still all connected?" Answer, "Yes." #

From this record we find no evidence that the wires were broken, although it is conceded that the wires were down. Under the circumstances in this case there was no showing of negligence of the defendant in not inquiring what the condition of the wires was from the meter on down into the fuse box, which was the property of the plaintiffs. //

It is our conclusion that the trial Court properly set aside the verdict of the jury, and rendered judgment in favor of the defendant, and the judgment of the trial Court is hereby affirmed.

Judgment affirmed.

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Abstract

Gen. No. 10500.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

MAY TERM, A. D. 1951. 344 I.A. 278¹

PEOPLE OF THE STATE)	
OF ILLINOIS,)	
Defendant in Error,	)	Writ of Error.
vs.)	
LeROY BEVERLY,)	
Plaintiff in Error.)	

WOLFE,-- P. J.

Stephenson *for writ 5-10-51*

The State's Attorney of Whiteside County, Illinois, filed an information in the County Court of said County, charging LeRoy Beverly with the crime of keeping a house of ill-fame in said County. The defendant appeared, represented by his attorney and entered a plea of not guilty. The case was tried before a jury in said County, and the defendant found guilty. The jury fixed his punishment at imprisonment of one hundred and eighty days and a fine of \$200.00. The Court entered judgment on the verdict. The case is brought to this Court on a writ of error. ✓

Robert Wheelhouse, a private investigator, testified that on June 30, 1950, at about midnight he saw the defendant, Beverly, at the Beverly Hotel in the City of Freeport, Stephenson County, Illinois; that as he entered the hotel, the defendant, Beverly, was seated and then went behind his desk; that he asked

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Beverly for a room; that Beverly brought out the register and he, (Wheelhouse,) signed it in the name of Jack Carson; that Beverly asked him if he intended to stay all night, and Wheelhouse asked him, what he meant and Beverly then asked him, if he wanted a girl. Wheelhouse answered yes. Beverly then said, "You don't have to register" and he erased Wheelhouse's signature and said Wheelhouse should pay him \$3.00. He paid him the \$3.00 and Beverly took him upstairs to Room 43 and said he should wait there, and that a girl would be there in ten minutes. A girl did come to the room in about ten minutes and gave her name as Gwen. She took him over to Room 62 and an act of prostitution was committed with her. Wheelhouse further testified that he went back to the same hotel on July 15, 1950, and saw Mr. Beverly in the lobby and told him he wanted a girl. He was not requested to register and Beverly told him it would be \$3.00 and that he should pay the girl; that at that time a girl seated in the lobby crossed over by him and Beverly indicated that he should follow her; that he followed the girl up to Room 62. It was the same girl that he had seen there before and she asked him for \$10.00; that he offered her \$5.00 and she finally accepted \$8.00; that after that he had intercourse with her; that he went out and reported to Mr. Brown his superior, and he saw officers go into the hotel.

Homer Marcum testified that he was an investigator for Earl J. Brown, Private Detective Agency of Chicago, Illinois; that he saw the defendant, Beverly, about midnight on July 1, 1950; that he paid Mr. Beverly \$3.00 for a room and Mr. Beverly then took him to Room 56, and left him there; that a girl came into the room and an act of prostitution took place. He again saw Mr. Beverly on July 15th. He was sitting behind the registration

desk. I asked for a room. He said, "You have been here before?" I said, "Yes." He said, "You will have to wait a few minutes." Mr. Marcum sat down and he saw the other investigator come downstairs; that Beverly motioned to him to go upstairs. The same girl whom he had been with before was standing upstairs and motioned for him to come up, and she took him to the same room they had occupied before; that they undressed and got into the bed together. A loud rap came on the door and some one said, "It is the deputy sheriff." The girl grabbed her dress and ran from the room naked. He heard a commotion and looked around and saw the officers and he told them where the girl had gone. The officers broke open the door on the opposite side of the hall, and he heard the girl say, "Let me put my dress on." I saw them take her out of the room and walk down the hall. Later, they took us to the police station. There was some corroboration of this testimony by the police officers.

Several witnesses were called including the night clerk of the Beverly Hotel, who stated that they had never seen Mrs. Gwen Decker with any man except her husband. Mr. Beverly did not testify in his own behalf.

It is insisted by the plaintiff in error that the evidence in this case does not show that he is guilty as charged in the information. We are satisfied from reading the evidence, that the jury who saw the witnesses and heard them testify, were correct in finding the defendant guilty. ||

It is insisted by plaintiff in error that the Court erred in giving an instruction relative to the testimony of the investigators. We have examined this instruction and we are satisfied that it was not error to give it and that it properly

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stated the law. A similar instruction was approved by this Court in the case of *The People vs. Fichter*, 196 Ill. App. 516, where the defendant was charged with unlawfully keeping a tippling house, and the evidence of private investigators was used by the people. In that case we said: "In a criminal case the testimony of private detectives employed and paid to secure evidence against the defendant is to be considered and weighed like the testimony of other witnesses, with a proper consideration of the influences under which such witnesses were acting." *The People vs. Newbold*, 260 Ill. 197.

Complaint is also made to the instruction given on behalf of the people, which is as follows: "The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt, that the defendant, LeRoy Beverly, committed the crime as charged in the information, then you should find the defendant guilty." The same instruction was approved by the Court in the case of *Christi vs. The People*, 206 Ill. Page 343. The abstract in this case is insufficient in that it does not contain any of the instructions given by the Court. In order to raise an objection to the given instructions, it is necessary that they be contained in the abstract. It is stated in the case of *The People vs. Boyden*, 400 Ill. at Page 413: "Error is assigned on the giving of instructions. The abstract does not recite that the instructions as therein enumerated are all of the instructions that were given. Under this condition of the abstract we are not required to consider an assignment of error based on the giving of instructions."

The plaintiff in error contends that his conviction was obtained through entrapment by special investigators at the instance of the people, therefore his conviction should not be

allowed to stand. We find no merit in this contention, as the investigators did nothing to induce Beverly to commit the crime. From this evidence it appears that Beverly was the one that proposed to the investigators that the prostitution be committed. In the case of *The People vs. Boyden*, supra, it is stated: "Complaint is made by plaintiff in error that the witness, Edward Russell, was employed to trap him, and that the evidence of a paid investigator is entitled to but little weight and conviction cannot be based thereon. Simply affording the defendant the opportunity to violate the statute does not constitute an entrapment." The record in this case shows that the investigators were allowed to testify without any objection whatsoever, by the defendant, therefore he is not in a position to raise the question of entrapment. *People vs. Valecek*, 404 Ill. 461 and *People vs. Rudecki*, 309 Ill. 125.

From the record in this case, it is our conclusion that the defendant had a fair and impartial trial, and the evidence amply supports the verdict of the jury. The judgment of the trial Court is herefore affirmed.

Judgment affirmed.

Abstract

General No. 10481

Agenda No. 27

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
~~SEPTEMBER~~ TERM A. D. 1951
FEBRUARY

344 I.A. 278²

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

SAVANNA LODGE No. 1095, LOYAL
ORDER OF MOOSE, a Corporation,

Plaintiff in Error.

WRIT OF ERROR TO

THE CIRCUIT COURT

OF CARROLL COUNTY.

ANDERSON -- J.

This criminal case comes to this court upon a writ of error sued out by the defendant, Savanna Lodge No. 1095, Loyal Order of Moose, a corporation. An indictment consisting of seven counts was returned against the defendant by the grand jury in Carroll County. In this the defendant was charged in each count with keeping certain slot machines contrary to the statute. (Illinois Revised Statute, Chap. 38, Par. 341.) Defendant entered a plea of not guilty, a jury was waived by agreement, and the case was tried by the Court, which found the defendant guilty on all the counts of the indictment except Count One, and imposed a fine against it in the sum of \$166.66 on each of the six counts. The slot machines hereinafter referred to were seized by the People by virtue of a search warrant issued by the police magistrate of the Town of Savanna on May 6, 1949. The warrant was issued on the affidavit or complaint

of Lawrence A. Smith, State's Attorney of Carroll County, who also prosecuted this case.

The complaint or affidavit, in the usual form for the issuance of a warrant, was sworn to and filed with the police magistrate on May 6, 1949. This complaint stated in substance that certain slot machines were possessed by the defendant in its club rooms and were used for the purpose of unlawful gaming in Carroll County. The affidavit further stated that the slot machines were in the building occupied and in possession of the defendant. The affiant stated that he had just and reasonable grounds to believe, and does believe, that the gaming apparatus is now concealed in the said building, and that the following are the reasons for such belief: the affiant knows of his own knowledge that in July, 1948, the defendant had paid the government of the United States the necessary fees and taxes for a federal license on the said slot machines to be used upon the premises at No. 125 Main Street in Savanna, Illinois, and that such license had been issued for a period of one year, and was now in full force and effect, and that the foregoing is disclosed in gaming record ten, in the records of the government of the United States in the office of the Collector of Internal Revenue, and that affiant had read the said record which gave the defendant a license to possess and operate certain slot machines at the club rooms aforesaid described.

It is admitted that the seizure of the slot machines was under and by virtue of this affidavit and search warrant issued. ✓

Hal Shrake testified on behalf of the People that he was the chief of police and constable in the City of Savanna, that he went, in pursuance of the search warrant heretofore mentioned, to the club rooms of the defendant on May 6, 1949, with Lawrence A. Smith, the State's Attorney, that he seized the slot machines above mentioned and took them to the jail.

George E. Baker testified on behalf of the People that he was club steward and bartender for the defendant, and that Mr. Smith, State's Attorney, and Mr. Shrake, constable, on the day of the seizure of the slot machines, came to the club rooms. Mr. Shrake had a paper in his hand. One of the fellows pushed the electric door latch, and both men entered the club rooms. Shrake read Baker a warrant for seizure of gambling devices and then the machines were removed from the kitchen. Baker had not seen them since. There was no hesitancy on anyone's part in admitting Mr. Shrake and Mr. Smith to the premises. It was in the afternoon, and there were other people in the club rooms, all members of the lodge. The constable showed Baker the papers that he had in his hand before the lock was released, and read them to Baker before the machines were seized. He did not know the contents of the papers until he had admitted the constable.

Kenneth Trunninger testified on behalf of the People. He stated that he was secretary of the defendant Lodge at the time of the seizure of the machines. The Lodge had paid \$300.00 to the government for a special stamp tax for the operation of the slot machines. The stamp permitting the operation of the machines was issued on July 1, 1943 and was for a period of one year ending July 1, 1949. There were slot machines on the premises during the period of time covered by the license from its date of issuance until May 6, 1949.

This is all the testimony in the record relevant to the issues involved. Defendant offered no testimony whatsoever.

There is no claim, either from the evidence or from the motion to suppress the evidence, nor any inference to be drawn from the evidence, that the defendant claimed to own or to have any interest whatsoever in the slot machines in question. Prior to the hearing of the testimony offered by the People, defendant filed a motion with the Court to impound the exhibits, the slot machines, and to suppress the evidence with relation thereto. This motion was denied by the Court. Defendant contended in the trial court and contends here that this

ruling of the Court was in error. The basis of the motion is that the slot machines were taken by the constable by virtue of an unlawful affidavit and warrant, and that the seizure of the same was contrary to the provisions of the constitution of the United States and the constitution of the State of Illinois. In substance the defendant contends that Smith's affidavit in support of the warrant is insufficient in law because the information was obtained by Smith in July, 1948, and the affidavit for warrant was not issued until May, 1949. This period of time was too remote from the time of the execution of the affidavit according to the contention of the defendant. He cites in support thereof, *People vs. Brooks*, 340 Ill. 74; *People vs. Sovetsky*, 343 Ill. 583.

It may be that if the defendant had admitted or claimed in any place in the record that the Lodge owned the machines in question, that overruling of the motion to suppress the evidence, viz. the slot machines, would be error. The reason it was not error is that the defendant did not claim or admit it owned the slot machines. This question was considered by the Supreme Court in *People vs. Exam*, 382 Ill. 204, where the question of suppression of certain evidence under an alleged void search warrant was discussed by the Court. The Court says on page 209: "The property admittedly not belonging to him or being property in which he has any interest or right of possession, we are at loss to see how he can complain either of its seizure or of its use in evidence as being a violation of his constitutional rights. Clearly, if the property is not his, and he has no interest in it, and no right to its possession, he is not in the position of giving evidence against himself when it is introduced as exhibits upon the trial. Such was the ruling in *Hayward vs. United States* (C. C. A.) 268 Fed. 795, in which certiorari was denied by the United States Supreme Court in 256 U. S. 639, 41 S. Ct. 449, 65 L. ed. 1172."

The fact that defendant at no time, either in the presentation of the motion or by the motion itself, or by the testimony offered at the trial, claimed to own the slot machines in question, precludes him from now claiming that the slot machines were seized unlawfully. The trial court for this reason alone properly ruled that the slot machines should be received in evidence. Regardless of this question, the testimony of Kenneth Trunninger alone conclusively showed that the defendant had in its possession and was using the gambling devices on the day the warrant was issued. This is corroborated by the evidence of Hal Shrake, who served the warrant and who testified that he took the slot machines away with him. No objection was made to his testimony by the defendant until after he had left the stand and the People offered the people's exhibits in evidence. Defendant's counsel then moved to strike his testimony. The motion was denied by the Court. This objection came too late, and the Court properly overruled the said motion. *Poehlmann vs. Kertz*, 204 Ill. 418; *The Chicago Union Traction Company, et al vs. Minnie May*, 221 Ill. 530.

By the testimony of competent witnesses as above mentioned, which is not denied by the defendant, he was found guilty by the Court. There is no doubt from an examination of this record that the defendant was guilty beyond a reasonable doubt of the charges alleged against it. Even assuming there may have been some error, our Supreme Court has said in many cases involving criminal trials and has recently stated in *People vs. Quevreaux*, 407 Ill. 176, at page 185: "While the record is not entirely free from error, it is not the policy of this court to reverse a judgment of conviction unless it appears that real justice has been denied or that the verdict of the jury and the judgment of the court may have resulted from such error. (*People vs. Susanec*, 398 Ill. 507, 515; *People vs. Vaughn*, 390 Ill. 360, 374.) We conclude that defendants were not

prejudiced by any error in this record, and that the proof is not so unsatisfactory as to justify us in entertaining a reasonable doubt of guilt."

In this case, even if the motion to suppress the evidence had been allowed, there is ample and sufficient proof in the record to convince any court that the defendant was guilty. Defendant had a fair trial, and in our opinion was proven guilty beyond a reasonable doubt. The trial judge properly found it guilty and his judgment was correct. The judgment of the Circuit Court should be and is affirmed.

Judgment affirmed.

Abstract

General No. 10495

Agenda No. 6

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

344 I.A. 279

MAY TERM, A. D. 1951.

FRANK J. LOEWEN,

Plaintiff-Appellee,

vs.

THE GUARDIAN TRUST COMPANY, as
Trustee, et al.,

Defendants-Appellees,

MAXWELL KUNIN, THOMAS M. SMITH
and EUGENE A. KATZ,

Objectors-Appellants,

THE TRUST COMPANY OF CHICAGO,
AURORA-LELAND HOTEL COMPANY,
JOHN KNELL, et al.,

Appellees.)

APPEAL FROM

CIRCUIT COURT

OF KANE COUNTY,

ILLINOIS

ANDERSON, J.

This case comes to this Court by appeal from the Circuit Court of Kane County from a decree entered by that Court. Appellants contend that Circuit Court had no jurisdiction to enter the decree. Appellees contend that the order or decree is interlocutory and hence not appealable and in alternative that if Court finds that order is not interlocutory that the Court did in fact have jurisdiction.

In October, 1926, a land trust was created, under which The Guardian Trust Company of Cleveland was named as trustee. The corpus of the trust was improved real estate in Aurora, Illinois. Beneficial land trust certificates evidencing equitable ownership in the trust were sold to various people, some of them parties to this suit. In June, 1934, the original trustee having become incompetent to act, a complaint was filed in the Circuit Court of Kane County averring these facts, and upon a hearing a decree was entered appointing The Trust Company of Chicago, one of the Appellees herein, as successor in trust. This decree conferred and confirmed upon the successor in trust extensive powers and duties contained in the original trust instrument. This decree entered on August 27, 1934, reserved jurisdiction of the Court in the following language: "That this Court retain jurisdiction of the subject matter of this proceeding and of the parties hereto for the purpose of entering such further decrees and orders as may be necessary for the effectual carrying out and execution of the Trust imposed by said deed of Trust."

On April 13, 1950, The Trust Company of Chicago, one of the Appellees, leave of court being first had and obtained, filed a petition in the same suit and in the same court for instructions relative to various trust problems involved in carrying out the trust. The petition further stated that the successor trustee had agreed to certain changes in a lease covering the trust property. Lessee sought to purchase the property, and trustee recommended it, and asked for approval of its actions and for instructions. The Aurora Leland Hotel Company, Appellee, lessee of the trust property, filed an answer praying that the relief requested by The Trust Company of Chicago, be granted, and that it be given additional relief. Objections were filed by various holders of certificates of beneficial interests. The appellant certificate holders, Maxwell Kunin, Thomas M. Smith, and Eugene A. Katz,

appeared generally and filed extensive objections to the proposed lease, and asked for certain affirmative relief, praying in general that a hearing be had, that the trustee's petition be denied, and the trustee be removed and a successor be appointed, that trustee be ordered to account, and the appellants be given such other and further relief as the circumstances might require. Later the appellants amended their objections and eliminated from them their previous prayers and substituted in lieu thereof a challenge to the court's jurisdiction to hear or pass upon any of the matters presented therein. The substance of the objection was that the Court in its decree entered August 27, 1934, had no power to reserve jurisdiction; that the reservation of jurisdiction was unlawful and void. The trial court decreed that the motion of the objectors-appellants, to dismiss the petition for want of jurisdiction, be denied. The objectors-appellants, Maxwell Kunin, Thomas M. Smith, and Eugene A. Katz, appealed from this order. One of the appellees, The Trust Company of Chicago, contends and urges that the order, appealed from being interlocutory and not final, is not appealable. There is no doubt that this order is interlocutory. As was stated in Moffett Coal Company vs. Industrial Commission, 397 Ill. 187: "A judgment or decree is final and reviewable when it terminates the litigation on the merits in the case and determines the rights of the parties."

The Trial Court in the instant case overruled the appellants' motion that the court lacked jurisdiction, the effect of the same being the same as overruling a demurrer, and hence the court's order was not final or appealable. In re: Estate of Shellabarger 313 Ill. App. (2nd Dist.) 1.

In fact when the order is interlocutory and hence not appealable, the court is bound of its own motion to dismiss the appeal, notwithstanding the appellee's failure to make a proper motion to dismiss. General Electric Company, Appellee vs. Gellman Manufacturing Company, Appellant, 318 Ill. App. (2nd Dist.) 644.

Appellants admit that the order would not ordinarily be appealable but state that there is an exception to this rule and cite in support of the exception to the rule, Evansville Railroad Company vs. Asa Pixley, 150 Ill. App. 283. On page 285 of this opinion the Court says: "From the decree thus entered, dismissing its crossbill and dismissing it as a party to the original bill, the P. D. & E. Ry. Co. has taken this appeal. It is suggested that the decree is not final, the original bill being still retained as to the other defendants, and that no appeal lies from it. Owing to particular circumstances and hardships, the courts have refused to dismiss appeals from some judgments which did not completely dispose of the cases in which they were entered. Freeman on Judgments, Ch. 1, Sec. 35."

They also cite Crouch vs. First National Bank of Chicago, 47 Ill. App. 574, and Strey vs. Buehl, 265 Ill. App. 554. An examination of these cases in which the courts have held that because of reasons of peculiar hardship, denial of justice, estoppel or waiver by Appellee, shows that the Courts have made an exception to the general rule that appeals will not lie from interlocutory orders and the Courts have taken jurisdiction to try the cases on their merits. We see no reason here to depart from the general rule. We see no reason why any great hardship or denial of justice would be imposed upon Appellants that should require the Court to take jurisdiction in the instant case. We refuse to consider the question of jurisdiction and require the Appellants to go back to the trial court and have the cause considered on its merits. To be constantly making exceptions to well-established general rules of law because of peculiar circumstances, may soon by judicial precedent destroy the rule itself.

We feel that the decree is interlocutory and hence not appealable and the appeal should be and is dismissed.

Appeal dismissed.

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AGNES S. HANSON,

Appellee and Cross Appellant,

v.

HELEN P. RAND, Administratrix
with the will annexed of the
Estate of Samuel A. Purves,
Deceased,

Appellant,

and

UNITED MOTOR COACH COMPANY, a
corporation,

Cross Appellee.

344 I.A. 18

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff Agnes S. Hanson sustained personal injuries on December 11, 1946, at Des Plaines, Illinois, in a collision between the car in which she was a passenger, allegedly driven by Samuel A. Purves who was killed in the accident, and a bus driven by an agent of defendant United Motor Coach Company, a corporation. Helen P. Rand, administratrix of the estate of Samuel A. Purves, is codefendant, plaintiff charging decedent Purves with wilful and wanton misconduct. Upon a trial before a jury defendant United Motor Coach Company was found not guilty, and a verdict in the amount of \$35,000 was returned against administratrix. From a judgment entered on the verdict defendant administratrix prosecutes this appeal.

Administratrix urges that the evidence is insufficient to support a finding either that the decedent, Samuel A. Purves, was the operator of the automobile in which

plaintiff was riding as a guest passenger, or that the deceased was guilty of any wilfulness or wantonness in the operation of such automobile.

Decedent was a doctor thirty-seven years of age at the time of his death, living and maintaining his office in Des Plaines, Illinois. Plaintiff was a registered nurse employed by Dr. Purves and was forty years of age at the time of the accident. On the evening of December 10th plaintiff and decedent had visited with friends in Des Plaines and had later stopped at a cafe imbibing several alcoholic drinks during the evening. On the morning of December 11th, at approximately 12:25 a.m., the passenger automobile was westbound on Route 14, a four-lane highway, near the center of the town of Des Plaines, and defendant corporation's bus was eastbound on the same highway. The headlights and interior of the bus were lighted, and there were overhead lights at regular intervals along the highway the vehicles were traveling. When the vehicles were several hundred feet apart, the passenger car, then traveling at a speed estimated from 50 to 60 miles per hour, was driven from the westbound highway across the center line almost to the limit of the eastbound highway, then suddenly pulled to the right, striking the right front of the bus with terrific force. Decedent died at the scene of the accident within a few minutes, and plaintiff received the injuries here complained of. She suffered a comminuted spiral fracture of the upper end of the right femur, commonly known as a broken hip, with displacement and shortening of the leg.

She had a fracture of the third rib on the left side and also a brain concussion. Her face was cut from the corner of her mouth to the angle of the jaw and down the neck, the wound extending into the parotid gland. Four of her teeth were broken. Her leg was in traction for 4-1/2 months, after which complications developed resulting in deformity in the leg. She was again placed in a cast and remained until some eight months after the accident, when she was able to move about on crutches. There was evidence that during all this period she suffered great pain. Five or six plastic operations were performed on her face and some surgery remained to be done at the time of the trial. Her face was scarred and misshapened at the time of the trial, and there was limitation of motion in the hip, shortening of 5/16 of an inch in the leg, and atrophy of the thigh. Her injuries are permanent. She had been unable to follow her profession as a nurse from the time of the accident to the time of the trial, some 2-1/2 years later, and her actual cash expenditures total \$13,204.15, including loss of earning power for 2-1/2 years.))

Defendant argues that there was no evidence to support the verdict since there was no evidence that Dr. Purves was driving the automobile at the time and place in question. While there is no testimony by any eyewitness as to which of the two parties was driving the car at or immediately before the collision, there is testimony of eyewitnesses from which an inference might reasonably be drawn that Dr. Purves was the driver of the car.))

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main results of the paper.

Earl Sheppard, a passenger on the bus, testified that immediately after the accident Dr. Purves' body was partly behind the wheel; that the body was on the left-hand or driver's side; that plaintiff was on the right-hand side; and that a portion of Dr. Purves' body was slouched over upon plaintiff. A police officer arriving at the scene of the accident a few minutes after the collision testified to finding the plaintiff "jammed under the right front cowl, between the seat and the cowl"; that Dr. Purves "was lying on his right side on the seat. His feet, the lower part of his body, were on the driver's side, under the wheel. His head was hanging over the edge of the seat on the right hand side." It further appears that the passenger automobile was one customarily driven by Dr. Purves. It is to be borne in mind that there were only two occupants of the automobile at the time of the accident, and one or the other must have been the driver. In view of the foregoing testimony we think the inference drawn by the jury that Dr. Purves was the driver of the automobile is not unreasonable. ||

Defendant argues that where the evidence is consistent with two hypotheses, one of which imposes liability and the other does not, the plaintiff's case must fail. She argues that there being no direct testimony by an eyewitness as to which of the occupants was driving at the moment of impact, it is entirely possible that the force of the impact caused "a churning spinning motion," and that the occupants "must have been hurled about the interior of

the forward passenger space like dice in a giant shaker." We think the conclusion arrived at by the jury which disregarded this hypothesis was a reasonable one. In the case of Lindroth v. Walgreen Co., 407 Ill. 121, the court said at page 135:

"A verdict may not be set aside merely because the jury could have drawn different inferences or because judges feel that other conclusions than the one drawn would be more reasonable. (Jefferson Ice Co. v. Industrial Com., 404 Ill. 290; Heiting v. Chicago, Rock Island and Pacific Railway Co., 252 Ill. 466; Tennant v. Peoria and Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409.) There is no complete absence of probative facts to support the inference drawn here and therefore the trial court properly overruled appellants' motions for directed verdict and for judgment notwithstanding the verdict."

In the case of Lavender v. Kurn, 327 U. S. 645, the court said at page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

We see no reason to disturb the jury's verdict on this point. ✓

Defendant argues at some length that prejudicial error was introduced in the case by the plaintiff's own testimony to the effect that she did not know how to drive a car. Plaintiff was called to the stand under

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used in the study.

3. The third part is a discussion of the results of the study.

4. The fourth part is a conclusion and a list of references.

5. The fifth part is a list of figures and tables.

6. The sixth part is a list of appendices.

7. The seventh part is a list of footnotes.

8. The eighth part is a list of references.

9. The ninth part is a list of figures and tables.

10. The tenth part is a list of appendices.

11. The eleventh part is a list of footnotes.

12. The twelfth part is a list of references.

13. The thirteenth part is a list of figures and tables.

14. The fourteenth part is a list of appendices.

15. The fifteenth part is a list of footnotes.

16. The sixteenth part is a list of references.

17. The seventeenth part is a list of figures and tables.

18. The eighteenth part is a list of appendices.

19. The nineteenth part is a list of footnotes.

20. The twentieth part is a list of references.

21. The twenty-first part is a list of figures and tables.

22. The twenty-second part is a list of appendices.

23. The twenty-third part is a list of footnotes.

24. The twenty-fourth part is a list of references.

25. The twenty-fifth part is a list of figures and tables.

section 60 of the Civil Practice Act for cross-examination by the defendant corporation, against which this testimony would have been admissible. The jury were instructed that the testimony was inadmissible against the defendant administratrix, but she insists that the prejudice was not thereby eradicated and the only way that it could have been avoided was to have granted separate trials in accordance with a motion made by her before the trial. We need make no comment upon this question other than to say that there was sufficient evidence, as indicated above, to establish that Dr. Purves was driving the car, without reference to the plaintiff's testimony; and from our reading of the entire record we are of the opinion that defendant administratrix was not thereby prejudiced.

Defendant contends further that there is a complete absence of any evidence that Dr. Purves was guilty of wilful and wanton misconduct or that such misconduct was the proximate cause of plaintiff's injuries. The numerous cases cited by defendant on this point are of no help, inasmuch as whether or not Dr. Purves was guilty of wilful and wanton conduct depends upon the facts and circumstances of the instant case. The evidence here shows that the passenger car was being driven in a straight line on the wrong side of the street, to the left of the center line of the highway, for a distance of several hundred feet at a speed between 50 to 60 miles an hour toward a bus, the interior and headlights of which were lighted, the driver of the passenger car making no attempt to decrease his speed or

alter his course until too close to the bus to avoid a collision, and then swerving suddenly at a high rate of speed directly into the side of the oncoming bus. No reason or justification appears anywhere in the evidence for this conduct on the part of the driver of the passenger car. Under the circumstances we think that the question whether or not Dr. Purves was guilty of wilful and wanton conduct was one for the jury to determine, and no reason appears why we should reverse their finding in that respect. In the frequently cited case of Tennant v. Peoria and P. U. Ry. Co., 321 U. S. 29, the court said at page 35:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., *supra*, 68; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, the court said at page 583:

"A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness

when it could have been discovered by the exercise of ordinary care. (Brown v. Illinois Terminal Co., 319 Ill. 326; Heidenreich v. Bromner, 260 Ill. 439; Illinois Central Railroad Co. v. Leiner, 202 Ill. 624.) The question whether a personal injury has been inflicted by wilful or wanton conduct is a question of fact to be determined by the jury. Bernier v. Illinois Central Railroad Co., 296 Ill. 464."

Complaint is made of the admission and exclusion of certain other evidence, but we are convinced from a careful examination of the record that no prejudicial error was committed in this respect. We are further of the opinion that plaintiff's argument, with respect to which error is alleged, was within legitimate bounds and that no prejudice resulted therefrom. The objections of defendant administratrix to certain instructions are hypercritical and without substantial merit.

There being no reversible error, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Schwartz and Robson, JJ., concur.

45543

JEANETTE FENTON, BETTY J. STRATTON,
and HELEN ZABLE, on behalf of them-
selves and all other members of
Illinois Traffic Division No. 14,
C.W.A.-CIO,

Appellees,

v.

ANNE C. BENSCOTER, KATHERINE P.
NELSON, MAE VIENNE, E. MURIEL
EDWARDS, ANNE BARBERY, ELLENORA
LEWIS, ESTELLE GLAD, GUINEVERE ROUSH,
THELMA VAN HORN and HELGA L. NISBET,
Appellants.

344 I.A. 191

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an interlocutory appeal from an order
entered by the trial court overruling defendants' motion
to dissolve an interlocutory injunction.

Plaintiffs (appellees) allege they are members
of Division 14 of the Communication Workers of America -
C.I.O. (hereinafter called Division 14) and filed this
suit on their own behalf and other members of Division
14. Defendants (appellants) are officers and members
of the Executive Board of Division 14.

On January 31, 1951, plaintiffs filed their com-
plaint consisting of two counts. On March 12, 1951, the
trial court, after a hearing on a motion to strike Counts
I and II, sustained the motion as to Count II and overruled
it as to Count I. Count I alleges in substance that
defendants wrongfully and fraudulently withdrew \$25,000.00
belonging to Division 14 and converted it to their own use.

On March 13, 1951, three of the defendants filed a
verified answer to Count I, and on March 19, 1951, the

other defendants filed their verified answer. In their answer defendants deny the wrongful conversion and state that all actions taken were in accordance with the by-laws and constitution of Communication Workers of America - C.I.O. The answers affirmatively allege that plaintiffs did not file their complaint in good faith, but that they are in fact employed by and are members of the International Brotherhood of Electrical Workers who are endeavoring to entice and take away the members of Division 14; that the complaint was filed for the purpose of libeling and asserting scandalous statements about the defendants; that plaintiffs do not represent the members of Division 14; and that the sole purpose of the suit was to make propaganda to entice members from Division 14. Plaintiff filed no reply to the affirmative allegations.

On March 15, 1951, plaintiff, Helen Zable, after notice, filed a verified petition for injunction alleging that on March 3, 1951, charges were filed by Division 14 against her charging that she had taken court action against the division in violation of the by-laws of the division. The charges further allege that she willfully supported the action of the labor organizations in conflict with Division 14, and that she maliciously attacked the officers. Her petition further avers that the charges are false and that if the trial board finds she is guilty she will be expelled, and that the purpose of the charges is to intimidate her into discontinuing the further

prosecution of this suit. She further alleged that the trial board before whom the charges would be heard consists of five persons selected by the Executive Board of Division 14, which is composed of all defendants; that she cannot receive a fair hearing before them, and prays that defendants be restrained from trying petitioner on the above charges within Division 14. After hearing arguments of counsel the trial judge on March 15 entered the temporary injunction restraining defendants from conducting any trial or proceeding against the plaintiff on charges filed against her on March 3, 1951.

On March 20, 1951 defendants filed an answer to the petition for injunction setting forth substantially the charges made against plaintiff that were to be the basis for her trial by Division 14, and attaching as exhibits specimens of handbills or roorbacks used by the International Brotherhood of Electrical Workers against the Communication Workers of America as a result of the proceedings in this suit.

On March 22, 1951, plaintiffs added Count II as an amendment to their complaint. It alleges substantially that the National Union has terminated the charter of Division 14; that the effective date of the cancellation of the Charter is April 2, 1951; that the funds of Division 14 will be transferred to the National Union as its sole property, which is outside of the jurisdiction of this court in Washington, D.C.; that said funds so to be



transferred are trust funds to be administered for the benefit of the members of Division 14, and that the amendment transferring is contrary to law and public policy. The count prays for an injunction restraining the transfer of the funds. Defendants filed their motion to strike this count which has not been argued.

On March 29, 1951, plaintiffs filed their Count III, as an additional amendment to the complaint. They allege although the sums of money of Division 14 may presently be in their custody, they have however been placed in special funds; that the defendants as the Executive Board of Division 14 was without authority to withdraw the money for said special funds. The count prays for an injunction restraining defendants from using said funds and prays that an accounting may be had of the uses and profits of the funds while they were in possession of the defendants. Defendants filed their motion to strike this count which has not been heard by the trial court.

On April 30, 1951, defendants filed their motion to dissolve the temporary injunction restraining the defendants from conducting the trial of plaintiff, Helen Zable, within Division 14. Defendants allege as a reason substantially the same facts as were set forth in their answer to the petition for injunction. Plaintiff filed no answer to the motion. The motion was denied on May 17, 1951.

Defendants raise numerous points for reversal of the chancellor. These points may be classified as follows:

A. The court erred in entering an interlocutory injunction against the defendants. 1. The complaint is based chiefly on information and belief and is not under oath. 2. The petition seeking interlocutory injunction does not allege any facts upon which the court can grant relief.

B. The court erred in failing to dissolve the interlocutory injunction. 1. The facts set up in affidavits and depositions, and attached to the petition to vacate the injunction, constitute a complete defense to the issuance of the injunction and the trial court should have dissolved the injunction. 2. The facts charged in defendants' motion to vacate the temporary injunction, and also pleaded in defendants' answers, constitute a bar to the suit and the entire proceeding should be dismissed.

As to A, the first ground for reversal, and the two subdivisions thereof, plaintiff, Helen Zable, filed her verified petition for injunctive relief by reason of defendants' efforts to expel her from Division 14. The complaint was filed on January 31, 1951, and the charges were preferred against plaintiff on March 3, 1951. The petition is verified and is not on information and belief. Defendants admit that injunctive relief may be sought on a verified petition, exclusive of the unverified complaint. Defendants had filed their answer to count 1 of the complaint; and the trial court, therefore, had jurisdiction of the parties, and accordingly could proceed to issue the

injunction provided the material facts for such relief are contained in the petition. An examination of the petition shows the facts charged took place after the filing of the complaint, and the temporary injunction prayed would in no way determine the merits of the complaint, but is merely to permit plaintiff to prosecute her complaint without pressure and duress and without requiring plaintiff to stand trial before a board selected by defendants. Such being the situation the trial court is vested with large discretionary powers in granting injunctive relief, and unless it clearly appears that this discretion has been abused, the order appealed from will be affirmed. Bernard Bros. Inc. v. Deibler, 326 Ill. App. 538, 542; Schock v. Illinois Bell Tel. Co., 324 Ill. App. 322, 331; Almar Machine Co. v. F. & W. Machinery Co., 301 Ill. App. 591, 596. We are of the opinion there was no abuse of discretion. ✓

As to B, subdivision 1 of defendants' points for reversal, an examination of the record makes it apparent that no love is lost between the parties litigant. If defendants' contention is to be given credence, a rival labor group is using plaintiffs as their puppets to gain control of Division 14 of which defendants are the officers and the executive board. If plaintiffs' contention is to be given credence defendants are wrongfully using the funds of the Division. There has been no hearing or decision on these charges. In fact the case is not at issue. To count 1 defendants have filed their answers, and to counts II and III

defendants have pending their motions to strike which have not been heard. Defendants ask the court on the basis of their answer to Count I, the answer to the petition for injunction and the petition to vacate the injunction, to reverse the order of the trial court denying their motion to vacate the injunction. The trial court is granted the same broad discretionary powers in dissolving an injunction as in allowing an injunction. Bernard Bros. Inc. v. Deibler, supra. In view of the state of the record, the trial court was right in denying the motion to dissolve the injunction and in so doing maintained the status quo of the parties. Its act did not conclude the rights of any of the parties. Guye v. Banis, 331 Ill. App. 415.

Defendants' second point of B asks us to dismiss the action, based on the pleadings, contending that the facts alleged in defendants' motion to vacate the temporary injunction and the answers filed to plaintiffs' Count I constitute a bar to this suit. The case of McDougal Co. v. Woods, 247 Ill. App. 170, covers this point. On page 174, the court said:

"The statute permitting appeals from interlocutory orders was not intended primarily to provide for a review by this court of the rulings of the trial court on demurrers or to secure from this court its judgment on demurrers before the trial court has ruled thereon. A bill, when first filed, is frequently demurrable, especially bills for injunction which are usually hurriedly prepared, but which may be made

good by proper amendments which the first court has power to allow. We have no such power. The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties."

The state of the record at this stage of the proceedings is such that an order by this court dismissing the complaint would be an arbitrary denial of justice.

This decision makes the motion and cross-errors of plaintiffs moot and eliminates the necessity of deciding them.

The order of the Superior court denying defendants' motion to dissolve the interlocutory injunction is affirmed.

Order affirmed.

Tuohy, P. J., and Schwartz, J., concur.

45282

HAROLD F. KIDD and ANGELINE
J. KIDD,

Appellants,

v.

E. T. MARQUARDT,

Appellee.

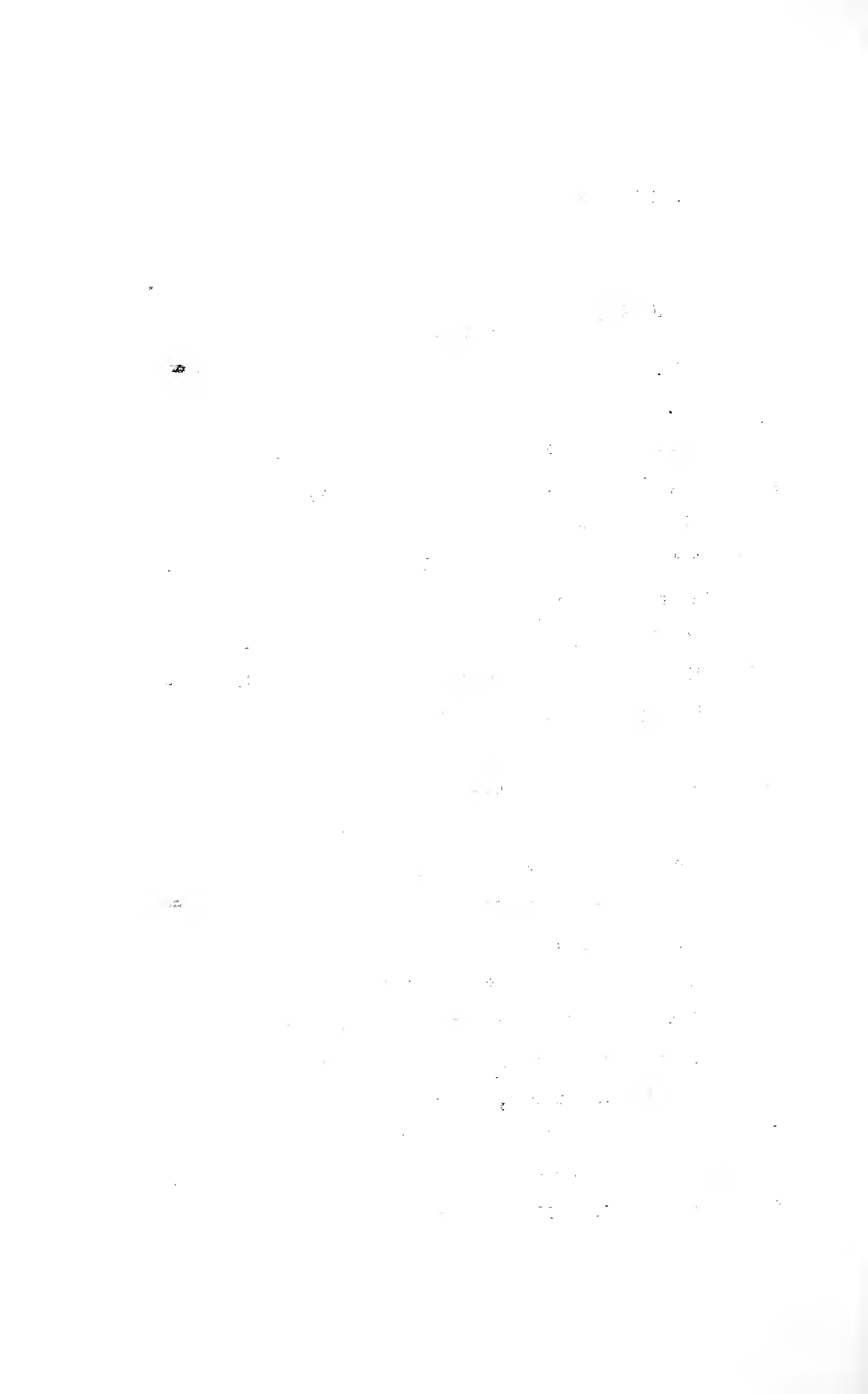
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) APPEAL FROM SUPERIOR
)
) COURT, COOK COUNTY.
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3441A. 19²

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF
THE COURT.

This case originated in a complaint filed by plaintiff, Marquardt, a real estate agent, averring that he had in his possession \$800 escrowed under a real estate contract for the sale of a house by defendants Kidd to defendant Sunsky and asking the court to determine who was properly entitled to that sum. The Kidds filed their counterclaim against Marquardt, alleging that they employed him as their real estate agent to sell the property in question and that he violated his duty as such agent. They made claim for exemplary as well as ordinary damages. The case was referred to a master and his report was approved by the chancellor, who entered a decree dividing the \$800 between Sunsky and the Kidds, from which part of the order neither has appealed. It also denied the relief prayed in the counterclaim, and it is from this that the Kidds appeal.

It appears that one Kessel, employed or associated with Marquardt, produced Sunsky as a prospective buyer and submitted a contract signed by him. This contract provided for a deposit of \$800, but was conditioned on Sunsky's ability to dispose of certain property



in Pennsylvania from which he expected to receive funds necessary to complete the purchase. The contract also provided that if Sumsky could not derive funds from the sale of the Pennsylvania property in sixty days, he was to get back the escrow money. Harold F. Kidd, referred to in the record as Dr. Kidd, objected to this provision, saying that if he were going to bind himself, he wanted Sumsky to pay him something in the event he did not go through with the contract. Kessel, at Dr. Kidd's direction, took the matter up with James E. Lonergan, the attorney who, at that time, represented the Kidds. The attorney himself added words to the contract signed by Sumsky, which with excisions theretofore made changed the clause of the contract in question to read as follows: "Unless the purchaser shall be entitled to a refund of the earnest money under the provisions hereof, the earnest money shall be paid as follows: \$500.00 to said broker and \$300.00 to the seller." The attorney did not ask that Sumsky initial or give written consent to the change, and as so changed it was signed by the Kidds. After default had been made in the contract and counter-plaintiffs had terminated it, they wrote Marquardt asking for the \$300. Thereafter, Sumsky importuned Dr. Kidd for an extension and negotiations to that end were undertaken but failed.

The brief of counter-plaintiffs summarizes their position as follows: "This case involves the liability of an agent, engaged to procure a contract for his

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principal who deliberately feigned performance of his duties by beguiling his principal to accept what he knew to be a spurious offer." The evidence does not support the position of counter-plaintiffs. It is clear from the evidence that the offer was not spurious; that Sumsky was not only a bona fide purchaser, but a very eager one; that Kidd was anxious to sell; and that the principal obstacle in the way of consummating a sale was Sumsky's inability to get funds from a sale of the Pennsylvania property. Kessel, it appears, offered to help Sumsky in the disposition of that property and perhaps made some optimistic statements in that respect. We can see no basis for complaint in that regard. His undertaking to do so would have been pursuant to any duty he owed the seller and not in conflict with it. X

Counter-plaintiffs are not in position to complain of the fact that the contract was altered in the manner hereinbefore described after Sumsky had signed it. James E. Lonergan, attorney for counter-plaintiffs in the transaction, was a party to this alteration and so testified. Moreover, at no time did Sumsky assert that the contract was in any way invalid. That he concurred in the change is evidenced by the fact that an extension agreement prepared at Sumsky's instance after notice of termination, included the same provision. He also testified that he had been told of it and that he had agreed that Dr. Kidd was entitled to some part of the escrow money in the event

the contract was terminated.

While the real estate agent is, as counter-plaintiffs have urged, a fiduciary (Norris v. Tayloe, 49 Ill. 17; Perry v. Engel, 296 Ill. 549; Rieger v. Brandt, 329 Ill. 21; Lerk v. McCabe, 349 Ill. 348), the area of his duty as such is circumscribed by the circumstances of the case. It is well-known that according to common custom, the real estate agent gets his compensation only if he effects a sale. It is expected of him that he will do whatever is not in conflict with his duty to find a purchaser ready, able and willing to buy upon terms fixed by his principal. It is also well-known that often in order to consummate a deal, a real estate agent will relinquish a portion of his commission. Here, it is clear that counter-plaintiffs were satisfied with the provision whereby they would receive \$300 in the event the sale was not consummated. They argue that the fact that Sumsky stood to lose only \$300 made the contract more precarious. As we have said, the evidence is entirely to the contrary. The whole deal depended on Sumsky's ability to raise the money from the Pennsylvania property, and the deal fell through on that account and not because of anything relating to the escrow money. In Scott v. Lloyd, 35 Pac. Rep. 733, the Supreme Court of Colorado reversed the trial court in a suit brought by a real estate agent for commission. The defense sustained by the trial court was that the agent had without the sellers' consent agreed to give the purchaser one-half of his commission.

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The upper court said: "While the law is strict in requiring good faith and fair dealing on the part of an agent towards his principal, and will not permit him to assume a double capacity whereby his personal interest may in any manner conflict with the interests of his principal, we are unable to see wherein the conduct of plaintiffs infringes this rule in the remotest degree. Why may not an agent, in competition with other agents, make any personal sacrifice he may choose to make in order to achieve success? May he not do what he pleases with the commissions that he is to receive from his principal? And if he deemed it necessary to successful competition to even pay a bonus to secure a purchaser, may he not do so, if in so doing he contravenes no duty he owes to his principal? Is not such an act an evidence of good faith and zeal in behalf of his principal, rather than of fraud or misconduct prejudicial to his principal's rights? We can see nothing reprehensible in plaintiffs' agreeing to divide their commission with the purchaser, but regard it rather as a personal sacrifice on their part to further the interests of the defendants."

Decree affirmed.

Tuohy, P. J., and Robson, J., concur.

23838 A
Abstract

General No. 10514

Agenda No. 20

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

344 I.A. 19

May Term, A. D., 1951

EDWARD GOODWIN,

Plaintiff-Appellant,

vs.

ROBERT LAMB,

Defendant-Appellee.

} Appeal from the

} Circuit Court of

} Henry County.

Dove, J.

Edwin Goodwin, accompanied by Geraldine Welch, on the evening of July 9, 1948, was driving a Chrevolet sedan in a westerly direction on Route No. 34 about two miles East of Kewanee. Robert Lamb, at the same time, was driving his Buick automobile in an easterly direction along the same highway. There was a collision, and both Goodwin and Lamb were injured. On October 18, 1948, Edwin Goodwin filed his complaint in the Circuit Court of Henry County against Lamb charging him in Count One of the complaint with negligence and in Count Two charging him with wilful and wanton misconduct. The defendant answered denying the charges of negligence and wilful and wanton misconduct and filed a counterclaim in which he charged in Count One that the

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collision was the direct and proximate result of the negligence of the plaintiff and in Count Two charged the counter-defendant with wilful and wanton misconduct. After the issues had been made up, there was a jury trial resulting in a verdict finding the defendant, Lamb, not guilty as charged in the original complaint, and upon the issues made by the counterclaim and answer thereto, the jury returned a verdict in favor of the counterclaimant and assessed his damages at \$8500.00. Thereafter, Goodwin's motion for a new trial was overruled, and appropriate judgments were rendered on the verdict. To reverse those judgments Goodwin appeals.

Count One of the original complaint charged appellee with general negligence in the management and operation of his automobile upon the occasion in question and specifically charges that he failed to keep his automobile under control and that he drove across the center black line in front of appellant's automobile at a speed of fifty miles per hour. The second count of the original complaint charged that appellee, with conscious indifference to consequences, wilfully and wantonly drove his car without warning signal over fifty miles per hour from the south lane of the highway into the north lane and into the automobile in which appellant was riding. Count One of the counterclaim charged appellant with driving his car at an unreasonable rate of speed across the black line to the south side of the pavement and failing to keep a look-out and failing to keep his automobile under proper control. Count Two of the counterclaim charged counter-defendant with driving his automobile at a high and dangerous rate of speed without maintaining any look-out and

That he wilfully and wantonly drove his car across the center black line into the south traffic lane and directly into the path of counterclaimant's car. The answers to the original complaint and to the counterclaim denied all charges of negligence and of wilful and wanton misconduct.

The evidence discloses that the accident occurred about 11:15 o'clock on the evening of July 9, 1948; that Mrs. Welch and appellant had spent the evening swimming in the canal two miles north of Sheffield and left there about 11:00 o'clock. Appellant was driving his 1941 Chevrolet automobile in a westerly direction toward Kewanee on Route 34 which is a paved highway eighteen feet in width and marked with the usual black line in the center. Appellee was alone in his Buick car and was proceeding along the same highway in an easterly direction and when the parties reached a point approximately two miles east of Kewanee the cars collided. After the collision the Buick car came to rest on the south half of the pavement entirely south of the black center line, headed in a northwesterly direction with its rear wheels on the dirt shoulder of the highway. The Chevrolet came to rest on the north side of the pavement thirty or forty feet west of the Buick car with its rear end in the ditch and against the dirt bank.

The record shows that on October 17, 1949 appellant's deposition was taken and at that time he testified: "The last thing I could remember was coming out of Sheffield that night and turning on the 'Y' and after that my memory was obliterated. I couldn't remember nothing as to the actual collision." Upon the trial he testified: "I recall when I first regained my memory

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The witness also said that the car was in the road.
The car was in the road. The car was in the road. The car was in the road.
testified: "The car was in the road. The car was in the road. The car was in the road.
out of the road. The car was in the road. The car was in the road. The car was in the road.
after that my memory was obliterated. I couldn't remember
nothing as to the actual collision. The car was in the road. The car was in the road.
testified: "I recall when I first regained my memory

concerning this collision. It was October 27, 1949. I was home for my cousin's wedding. I was riding home from Joliet. I now recall that I kept my car on the right half of the road as I approached the point of this collision. All at once my memory has come back and I remember all the details of my trip from Sheffield to the scene of the collision. Until October 27, 1949 I remembered no details from Sheffield a distance of about 14 miles."

Upon the trial in the circuit court on March 6, 1950 appellant testified that after leaving Sheffield about seven o'clock of the evening of the accident, he, accompanied by Mrs. Welch, went to the canal two miles north of Sheffield and they spent the entire evening there swimming, leaving there after eleven o'clock that evening. He further testified that as they proceeded along Route 34 previous to the collision he had both hands on the steering wheel, knew what he was doing and remembered all about it; that just before the accident he was driving about 45 miles per hour and as he approached the Brady car he dimmed his lights and Brady dimmed his; that "just as I got up to him I noticed another car directly behind him but a little over so you could not see him so well and the next time I noticed the car he was directly in front of me across the road. I put on the brakes as hard as I could and threw my arm up in front of Mrs. Welch and I said: 'he is going to hit us' or like that and that is the last I knew until I came to in St. Francis hospital in Kewanee." Upon cross examination this witness testified that he was positive that he was not over the center black line when he was hit by the

concerning this collision. It was about 11:15, 1932.
was none for my cousin's wedding. I was riding home from
college. I was riding with 1 boy's car on the street
of the road as I approached the home of this collision.
All the boys were very much interested in the collision.
Details of the collision were given to me by the
collision. I was told that I was riding on the
road. I was riding on the road at about 11:15.
Upon the first of the collision, I was riding
1930 defendant testified that I was riding on the
seven o'clock of the evening. I was riding on the
by my car, went to the center of the road and
and they were the entire evening. I was riding
there after eleven o'clock that evening. He testified
testified that he was riding on the road at
to the collision. I was riding on the road at
what he was riding on the road at about 11:15.
before the collision. I was riding on the road
and he was riding on the road at about 11:15.
Pray of him; that I was riding on the road at
another car. I was riding on the road at about 11:15.
could not see the car and the next time I noticed the
car he was riding in front of me. I was riding on the
on the road as I was riding on the road at about 11:15.
front of the car. I said: 'he is riding on the road'
or like that and that is the last I knew until I came to
in St. Francis Hospital in Kansas. Upon cross exam-
ination this witness testified that he was positive that
he was not over the center line when he was hit by the

Bulok; that he knew what he was doing and remembers all about it; that the Lamb car was directly behind the Brady car when he first saw it and that he was travelling on the north side of the highway and the Lamb and Brady cars were on the south side; that he could not see both their lights because the Lamb car was close to the shoulder and Brady's car was close to the center but not over the black line. The witness then continued: "Lamb's car was a few feet behind the Brady car. I would say 5 feet when I first saw him. He was putting on his brakes, at least it appeared so to me. My claim is the Lamb car was drawing up behind the Brady car at a terrible speed and then put on his brakes or did something that threw him out on my side. I was on the north side of the highway. The Brady car was not going too fast. I saw the Lamb car momentarily. It seemed like within five or ten feet of the Brady car the Lamb car turned out to go around the Brady car. There was no one else on the highway, just the Brady car and me and I couldn't see any other car when I passed the Brady car. It is a clear straight road except to get over the top of the hill."

Geraldine Welch testified that she was sitting in the front seat on the right of the Chevrolet car being driven by Goodwin on the night of the accident; that she remembered seeing the Brady car "coming toward us on the south side of the pavement just before the accident. As we met this other car which was going eastward it seemed like there was just two sets of headlights in front of us and the next thing it seemed like there was another car swerving right out in front of us and all I saw was a big light-colored

Bluck; that he knew the car was coming from the north
about it; that the Lead car was approaching from the north
he first saw it and that he was traveling in the south lane
of the highway and the Lead car was coming from the
south side; that he could not see both the car in the south lane
the Lead car was closer to the witness than the car in the
close to the car in the south lane; that the car in the
south lane was closer to the witness than the car in the
the Lead car. I saw the Lead car coming from the north
He was going in the south lane. I saw the car in the
My car was in the south lane. I saw the car in the
car at a terrible speed and I saw the car in the
something that threw him out of the car. I saw the car
north side of the highway. The Lead car was not going
fast. I saw the Lead car coming from the north
within five or ten feet of the Lead car. The car in the
out to the south lane. The car in the south lane was
the highway. Just as the car in the south lane was
and other car was in the south lane. I saw the car in the
straight ahead except for a very slight turn to the right.
The car in the south lane was coming from the north
the front seat on the right of the Government car. I saw
driven by Goodwin on the right of the car. I saw the
remembered seeing the Lead car coming from the north
side of the pavement just before the accident. As we were
this other car which was going eastward it was of like
was just two sets of headlights in front of us and the next
thing it seemed like there was another car sweeping right
out in front of us and all I saw was a big light-colored

car."

Forest Brady testified that he was a machinist residing in Muscatine, Iowa; that upon this evening he attended a movie in Kewanee and then started to drive to Neponset; that he was proceeding on Route 34 driving in an easterly direction in his own traffic lane on the right side of the pavement and observed the Chevrolet car some distance in front of him approaching him from the east. As abstracted he then testified: "There was another car in back of me. I saw his lights in the rear view mirror. That car (the Buick being driven by appellee) came up fairly fast. The car approaching me from the opposite direction (the Chevrolet being driven by appellant) went on by me as an ordinary car would and in back of me hit the car coming in back of me. I heard the squealing and I heard the crash. The crash took place about the distance of the length of the court room behind me. - - - This car coming toward me and going toward Kewanee up until the time I met it and while it was in my view was on the right side of the road. It did not come over the black line at all." On cross examination this witness said: "I don't know where the Goodwin car was after it passed me and did not see it after it was abreast of me. I heard nothing behind me except the crash. My attention to the rear was first attracted by the lights shining in my eyes from the rear-view mirror. Two lights were coming directly at me when I first noticed them and they looked as if he was pulling out into the left lane to go by me because the beams changed gradually. The lights mainly pulled out of the

vision of my rear-view mirror and disappeared so I didn't see the car behind me at all. - - - This accident happened approximately the distance of the court room behind me. I was not involved because I was in front of the accident. It happened after I had gone by the other car. It might have been a greater distance. It was difficult for me to judge distance in my rearview mirror at night. I did not see the Goodwin car after it passed my car. I do not know where this impact took place with reference to the north or south half of the pavement and do not know the parties in the cars. The car I met stayed on the north half of the pavement until I met it and I do not know where it went after I went by. All I saw behind me was the lights of the car behind change direction. I saw them look as if they were going to pass me. If he had come out on the north side of the road I would have lost the vision entirely. My main concern was to stay in my own lane and I was paying attention to that primarily."

Appellee denied that he ever crossed the black center line and testified that on the evening in question he had drunk two glasses of beer and then started out alone to drive to Sheffield and was proceeding east in his south lane of traffic along Route 34 at 45 to 55 miles per hour; that he first observed appellant's car when it was 150 yards east of his car and first paid especial attention to it when appellant's car left its lane of traffic and came over the center black mark. His cross-examination as abstracted then continues: "I let off the gas of my car and went on the shoulder a little bit with right wheels of my car. When

the shoulder a little bit when the wheels of my car. Then
then continued: "I let off the gas of my car and went on
the center black mark. His cross-examination as reported
when appellant's car left the lane of traffic and went over
east of his car and light into a ditch at the intersection of
that he first observed appellant's car when it was in the
lane of traffic about 100 to 125 feet from the intersection
to drive to the left and was proceeding east in his lane
he had drawn two glasses of beer and then turned out alone
center line and testified that on the evening in question
appellant asked him to go to the car and get the glasses
own lane and I was saying something to him. I testified
the vision entirely. My main concern was to get the glasses
come out on the north side of the road. I had never lost
few then look as if they were going to turn right and
me was the lights of the car which came out of the lane. I
not know where it went after I saw it. All I saw was
on the north side of the road and I saw it go to the
do not know the car is the car. The car I saw go to
reference to the car or to the left of the car and
my car. I do not know where this light was. I saw it
at night. I did not see the car in the lane of traffic
difficult for me to judge distance in my opinion at that
car. It might have been a greater distance. It was
happened approximately the distance to the car from
didn't see the car behind me at all. -- This accident
vision of my car when it was in the lane of traffic and

they continued in that direction on my side of the road I pulled my car a good half off the pavement and it looked like they were going to hit the entire length of my car and I put on brakes, my car skidded sideways. Counter-clock-wise. The back end swung to the south, I was 150 yards west of the point where the accident happened when I first noticed the car coming from the opposite direction. I probably travelled 80 feet on the shoulder before I put on brakes. Then I put on the brakes when the car was about two car lengths away. I don't know how fast I was going after I travelled 80 feet on the shoulder. I know it was a reasonable and proper and safe speed. I didn't look at the speedometer but would say I was going 30 miles per hour. I put on the brakes when I was $2\frac{1}{2}$ car lengths away and the rear of my car swung to the south. I put on the brakes quick, turned the wheel hard and recall that my car skidded and the rear end went to the south. That is the last I remember. I say it was 150 yards they drove on the wrong or south side of the pavement before they struck my automobile."

We have set forth the evidence of those who testified as to the occurrence with considerable detail inasmuch as counsel for appellant insists that the verdict is manifestly against the weight of the evidence. It is their theory that appellee attempted to pass the Brady car and turned out into the west traffic lane and drove his Buick car across the black center line directly into the path of the Goodwin car. It is the theory of counsel for appellee that as soon as the Goodwin car had passed the Brady car it crossed

the black center line and proceeded into the wrong traffic lane and crashed into the Lamb car. Counsel for appellant insists that the story of the situation immediately prior to the collision as testified to by appellee is unreasonable and incredulous. Counsel for appellee insists that appellant's version of the occurrence is an illogical one. Each party insists that the weight of the evidence supports his theory of how the collision occurred and that he was right and the other party at fault. Counsel for appellant state that Mr. Brady testified that appellee drove his Buick car directly in front of appellant's car and that Brady heard the crash of the collision right behind him when the two cars came together on the north side of the center line. Brady's testimony was that he did not know where appellant's car was after it passed him and did not know where the impact took place with reference to the north and south half of the pavement and that ^{all} he saw through his rear view mirror were the lights of the Lamb car change direction. We refrain from any further comment upon the evidence or its weight inasmuch as the judgment must be reversed because of an erroneous instruction.

The authorities are all to the effect that when the evidence is as conflicting as the record here discloses that then the jury must be correctly instructed and any instruction which directs a verdict for a plaintiff or counter-claimant must contain all the elements necessary for a recovery. At the request of appellee, the court gave to the jury this instruction: "The Court instructs the jury that the defendant, Robert Lamb, has filed a counterclaim in this case. If you find from a preponderance of the evidence that the defendant,

the black center line and proceeded into the wrong traffic lane and crashed into the east side. Counsel for appellant insists that the story of the situation immediately prior to the collision is testified to by appellee is unreasonable and inconsistent. Counsel for appellee insists that the version of the occurrence is a factual one. The jury insists that the signs of the evidence support the theory of how the collision occurred and that the defendant and the other party at fault. Counsel for appellant insists that the jury testified that appellee was at fault for the collision in front of appellee's car and that the jury found the cause of the collision right before it when the car came to a stop on the north side of the center line. The jury testified that he did not and where appellee's car was when it passed him and did not find where the impact took place with reference to the north and south half of the movement and that the jury through the rear view mirror saw the lights of the car and change direction. He believed that the car was coming upon the evidence on the right side and on the left side must be reversed because of an erroneous instruction.

The jury finds that the evidence is a conflict and the jury could have also found that then the jury must be correctly instructed and any instruction which directs a verdict for a plaintiff or counter-claimant must contain all the elements necessary for a recovery. At the request of appellee, the court gave to the jury this instruction: "The Court instructs the jury that the defendant, Robert Lamb, has filed a counterclaim in this case. If you find from a preponderance of the evidence that the defendant,

Robert Lamb, was not negligent in operating the motor vehicle in which he was driving at the time and place in question, and further find from a preponderance of the evidence that the plaintiff, Edward Goodwin, was negligent in operating his motor vehicle at the time and place in question, and that the negligence of said Edward Goodwin was the proximate and direct cause of the accident, then you may find in favor of the defendant, Robert Lamb, on his counterclaim and against the plaintiff, Edward Goodwin, and fix the defendant Lamb's damages at such amount as you find has been shown by the preponderance of the evidence, in this case."

The charges of negligence contained in count one of the original complaint and the charges of negligence contained in count one of the counterclaim and the charges of wilful and wanton misconduct as charged in count two of the complaint and the charges of wilful and wanton misconduct contained in count two of the counterclaim were submitted to the jury and the jury returned a general verdict finding the issues on the counterclaim in favor of defendant, Robert Lamb, and against the plaintiff, Edward Goodwin, and assessing Robert Lamb's damages at \$8500.00. The rule is that where the declaration consists of several counts, one or more of which state a cause of action the gist of which is malice, with another based on negligence only, and the verdict is general, without specifying the count on which it is based, the presumption is that the verdict is based on a cause of action of which malice is the gist. (Greene v. Noonan, 372 Ill. 286). This instruction directed a verdict for defendant on his counterclaim. It does not mention the issue of wilful and wanton misconduct. It does not confine the jury

even to the negligence charged but tells the jury that if they find that Goodwin was negligent in operating his motor vehicle at the time and place in question and that such negligence was the proximate and direct cause of the accident and that Lamb was not negligent in the operation of his motor vehicle that then the jury might find in favor of Lamb and fix Lamb's damages at such amount as shown by the preponderance of the evidence. As said in *Molloy v. Chicago Rapid Transit Co.*, 335 Ill. 164 at page 171, this instruction does not limit the right of recovery to the negligence charged in the complaint, and it directs a verdict and it was reversible error to give it. (*Rasmussen v. Wiley*, 312 Ill. App. 404). It refers the whole case to the jury without limitation and is also subject to the criticism made against it by appellant in that it does not require the assessment of damages to be based on the evidence as to damages for which the law allows a recovery but authorizes the jury to give such damages as in the opinion of the jury were shown by a preponderance of the evidence. (*Ill. Central Railroad Co. v. Johnson*, 221 Ill. 42,49). In view of the record in this case - pleadings, evidence and verdict - it was reversible error to give this instruction.

The court also gave to the jury the following instructions: "The complaint alleges that plaintiff Goodwin was injured and sustained damages and that the defendant Lamb was guilty of the following: That the defendant Lamb negligently and carelessly drove and managed his automobile, that he carelessly and negligently failed and omitted to keep his said automobile under ordinary and proper control, that he negligently and carelessly drove his automobile across the center black line

into and upon the automobile of plaintiff Goodwin. That the defendant Lamb wilfully and wantonly drove his said automobile from the south lane of said pavement into the north lane of said pavement while the plaintiff Goodwin's Chevrolet automobile was in full and plain view of the defendant Lamb, and the defendant Lamb wilfully and wantonly ran his said automobile upon and against and struck the Chevrolet automobile which plaintiff Goodwin was driving. That the defendant Lamb drove his automobile in a wilful and wanton manner without sounding a signal or giving a warning, and at a speed in excess of 50 miles per hour. That defendant Lamb in his answer denies all the foregoing acts of negligence and wilful and wanton misconduct and further Lamb alleges in his counterclaim that he was injured and sustained damages and that the plaintiff Goodwin was guilty of the following: that he drove his car at a high, excessive and dangerous rate of speed, that Goodwin carelessly and negligently failed to keep his automobile under proper control, that he negligently drove his automobile across the center black line and into and upon the automobile of the defendant Lamb, that plaintiff Goodwin negligently and carelessly failed to keep a lookout either ahead or laterally, that plaintiff Goodwin failed to pass the defendant Lamb to his right and yield one-half of the main traveled portion of the road, that Goodwin negligently drove the said Chevrolet to the left of the center line. That the plaintiff Goodwin without regard for the life of the defendant and with a conscious indifference to surrounding circumstances drove his said Chevrolet at a high and dangerous rate of speed, and without slackening his speed and without maintaining any lookout, wilfully and wantonly drove his said Chevrolet across the center line of the road and into the path

of defendant Lamb's automobile. The plaintiff Goodwin in his answer to the counterclaim of the defendant Lamb denies all the acts of negligence and wilful and wanton misconduct charged against him in the counterclaim of Lamb. These are the issues which you are to determine from the evidence under instruction of the Court."

The objection to this instruction is that it omitted to state that among the issues was whether the parties or either of them failed to exercise due care proximately contributing to their respective injuries, whether either of the parties violated the statute as alleged and whether damages were sustained as claimed by each party as set forth in their pleadings. There is some merit in this contention, but plaintiff's instructions 3,4,6,7 and 8 covered everything which counsel insists was omitted from this instruction. The instruction is not carefully drawn, but we do not believe it was reversible error to give it.

It is also said the court erred in giving the following instruction to the jury: "A fact may be proved either by circumstantial evidence or direct evidence, or both. Circumstantial evidence is such evidence as tends to prove a fact indirectly and gives rise to a reasonable inference in the minds of the jury of the existence of the fact sought to be proved. Direct evidence is such evidence as tends to prove a fact directly.

of defendant... his answer to the... all the... charged... the... instructed...

The collection... to state... of them... to their... violated... tained... There is... tions... was omitted... fully... give it.

It is... in... circumstantial... attention... direct... of the... Direct evidence...

The Court instructs the jury, as a matter of law that circumstantial evidence is just as legal and just as effective as any other evidence, provided the circumstances are of such a character and force to satisfy the minds of the jury by a preponderance of the evidence, of the truth of the charge or matter under consideration and concerning which such circumstantial evidence is given in proof."

In criticizing these instructions, counsel state that they tended to confuse the jury and erroneously gave the jury the impression that the court considered the inference to be drawn from the location on the highway of glass and oil testified to by Pletkovich, Sundberg and Palmer was just as legal and effective as the testimony of the occurrence witnesses. In our opinion these instructions state the law and the trial court would have erred if it had refused them.

Instruction No. 19 is as follows: "The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, Edward Goodwin, has failed to prove that the defendant, Robert Lamb, was guilty of wilful and wanton conduct as defined in these instructions then before plaintiff can recover he must prove the following propositions: (1) That he was exercising ordinary care and caution for his own safety at and just prior to the accident in question. (2) That the defendant, Lamb, was guilty of negligence as charged in the complaint. (3) That such negligence of the Defendant, Lamb, if any, was the proximate, direct cause of the injury of the plaintiff. And if you find from the evidence that the plaintiff, Edward Goodwin, has failed to prove by a preponderance of the evidence these three propositions as stated, or that he has failed to prove any one of them, then he cannot recover against the defendant, Lamb, and you should find the defendant, Lamb, not guilty."

The Court instructed the jury, that the evidence is not so strong and just as effective as any other evidence, provided the circumstances are of such a character and force as to satisfy the mind of the jury of the probability of the defendant, of the truth of the charge on matter under consideration and concerning the defendant's essential evidence is given in Court.

In this case, the evidence is not so strong and just as effective as any other evidence, provided the circumstances are of such a character and force as to satisfy the mind of the jury of the probability of the defendant, of the truth of the charge on matter under consideration and concerning the defendant's essential evidence is given in Court.

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Counsel insist that the giving of a similar instruction was held to be reversible error in Schmidt v. Anderson, 301 Ill. App. 28. The instruction in that case is not the same as the instruction complained of here, and this instruction is not subject to the criticism levelled against the instruction in Schmidt v. Anderson, supra. The substance of this instruction has been approved in Stivers v. Black and Company, 315 Ill. App. 38, 44.

Instruction No. 21 is as follows: "The plaintiff Goodwin is required to prove all the elements of his case by the greater weight of the evidence, and if he has not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the defendant Lamb, then in any such event the plaintiff Goodwin cannot recover from the defendant Lamb."

The instruction is a copy of instruction No. 39 appearing in "Standardized Jury Instructions," a brochure prepared by the Chicago Bar Association. Numerous cases are cited therein supporting it. This instruction, when considered with defendant's Instruction No. 14, which enumerates the elements of plaintiff's case, is not subject to criticisms directed against it, nor do we find any reversible error in connection with the other instructions complained of.

It is also insisted that the testimony of Gust Sundberg, John Pletkovich and Roy Palmer describing the condition of the highway the morning following the accident was erroneously admitted on the ground that it was all too remote. These three witnesses testified that they went to the scene of the accident between eight and nine o'clock the morning following the collision. They

testified that they there observed an oil mark and some broken glass and debris about five feet south of the black line on the south side of the pavement. Chief of Police Clyde Rorah had testified on behalf of appellant to the effect that he had arrived at the scene of the accident shortly after it happened and before the cars had been moved and before appellant had been removed from his car. He said he saw broken glass and debris on the pavement "a little east of the Buick on the south side of the black line and there was glass and debris all over there on the pavement and the shoulders." Palmer accompanied Chief Rorah to the scene of the accident the next morning and the Chief pointed out where the collision took place. Loren Bates and others had also been there shortly after the collision occurred and they testified that they observed some dust, oil and bits of glass in front of appellee's car and about a foot from the black line. The testimony of Pletkovich, Sundberg and Palmer was apparently about the same oil mark, glass and debris referred to in the testimony of Rorah and Bates. The several photographs of the highway, cars and the scene of the accident were also in evidence and were taken the morning following the accident and disclosed the same condition described by these witnesses. In our opinion this evidence was competent and the trial court did not err in overruling the objection interposed to the testimony of these witnesses.

In view of our conclusion that the giving of the first instruction herein referred to requires the submission of the issues in this case to another jury, it is unnecessary for us to determine whether the verdict is manifestly against the weight of the evidence or whether the judgment is excessive.

For the error indicated, the judgment of the Circuit Court of Henry County is reversed and this cause is remanded for another trial.

Reversed and remanded.

45454

J' 447 A

MARTIN SCHNEIDER,)	
Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
CARRIE DANIELLY,	)	OF CHICAGO
Appellant.)	

344 I.A. 346

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for possession entered in favor of plaintiff in a forcible detainer proceeding. No brief or appearance was filed by plaintiff in this court. The premises in controversy are located at 923¹/₄ South State Street in the City of Chicago, Cook County, Illinois.

The evidence shows that the defendant occupied the apartment for about thirteen years and that the premises were purchased by the plaintiff about three years before this suit was instituted. October 13, 1950 plaintiff served a notice upon the defendant stating that she had committed a nuisance on the premises as follows: "(1) broken windows on premises; (2) broken plaster throughout the apartment; (3) burned rubbish in the rear of the premises, contrary to the ordinances of the City of Chicago and the Regulations of the Board of Health." Afterwards, on November 13, plaintiff served another notice upon defendant asserting that defendant failed to cease and desist from committing the acts stated in the first notice.

Plaintiff's evidence tends to prove that defendant burned rubbish about the size of a "shopping bag" about four

or five times. Defendant denied ever burning of garbage about the premises. The court found that defendant did burn rubbish as stated in point 3 of the notice, and that defendant refused to admit plaintiff to the premises.

The Housing and Rent Act of 1947 as amended, section 825.6, provides in substance that every notice to a tenant to surrender possession of housing accommodations shall state the grounds on which the landlord relies for eviction of the tenant. Since no reference was made in the notices of defendant's refusal of plaintiff's access to the premises, the trial court was not warranted in resting its decision on that ground. With respect to the burning of garbage about the premises, plaintiff's testimony fails to show when the acts took place, nor does it appear that the alleged nuisance continued after written notice to the defendant. The burden of establishing this fact rested upon the plaintiff. In the absence of such proof we are impelled to reverse the judgment.

For the reasons given, the judgment is reversed and the cause is remanded with directions to enter judgment in favor of the defendant and against the plaintiff.

REVERSED AND REMANDED
WITH DIRECTIONS.

KILEY, P. J., AND FEINBERG, J., CONCUR.

45347

VINCENT O'BRIEN,
Appellee,

v.

WILLIAM R. BROWN,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

23
344 I.A. 547

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an appeal from an order of the Superior Court allowing additional attorney's fees for services rendered in connection with a previous appeal to the Illinois Supreme Court and petition for certiorari to the United States Supreme Court.

The litigation between the parties which began in 1946, has been bitter and protracted. Their names appear in the files of the Municipal Court, the Superior Court, the Appellate Court, the Illinois Supreme Court, and the United States Supreme Court. Their problems are again presented to this court.

In his original action, plaintiff (appellee), based on a verdict of a jury, recovered a judgment of \$4,460.00 covering triple damages for excess rent paid defendant (appellant) and \$500.00 for his reasonable attorney's fees under Section 205(e) of the Emergency Price Control Act of 1942 as amended. The order of the trial court, based on the verdict of the jury, denied defendant's counterclaim and further provided that jurisdiction was reserved for the purpose of assessing additional attorney's fees for future plaintiff's services

in the event of an appeal by defendant. Defendant appealed to the Supreme Court which affirmed the judgment on the complaint and reversed the dismissal of the counterclaim and remanded the cause for further proceedings, O'Brien v. Brown, 403 Ill. 183. Defendant filed a petition for certiorari to the United States Supreme Court which was denied. Thereafter, plaintiff filed his petition for the allowance of attorney's fees for services in connection with the appeal and petition for writ of certiorari. Defendant filed his answer denying that the trial court had jurisdiction to enter the judgment for such additional fees and denying that plaintiff was entitled to any fees. The trial court denied a motion to strike the petition and after hearing found that plaintiff was entitled to the sum of \$5,750.00 for additional attorney's fees and entered a judgment for said sum. Defendant made a motion in the Illinois Supreme Court for leave to file a petition for writ of mandamus directing the trial judge to expunge the judgment. This motion was denied.

Defendant assigns numerous points in which the trial court erred, and which he contends are grounds for reversal. For the purpose of this decision only two points need be considered.

A. Did the trial court have jurisdiction to enter the judgment for additional attorney's fees?

B. If the trial court had such jurisdiction, was the allowance of the sum of \$5,750.00 excessive?

As to the first point, this is an action under Section 205(e) of the Emergency Price Control Act as amended. 50 U.S.C.A. App., Sec. 925(e), the pertinent part of which for our purposes provides as follows:

"* * * In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; * * *"

Does this provision grant the lower court the power to tax additional attorney's fees for services rendered in connection with an appeal by the seller (landlord)? The case of Madrix v. Dize, 153 F. 2d. 274, cited by plaintiff we believe clearly answers this question. The case arose under the Fair Labor Standards Act which contains this provision (29 U.S.C.A. 216(b):

"(b) Any employer who violates * * * shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * The Court in such action shall, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action."

It will be noted that the provision with reference to attorney's fees is similar to that set forth in the

Price Control Act. The plaintiff recovered a judgment and defendant appealed. The judgment of the lower court was affirmed by the Supreme Court of the United States. Thereafter plaintiff applied to the trial court for an allowance of attorney's fees for services rendered on the appeal. The trial court dismissed the application and the Circuit Court of Appeals reversed the trial court. The court said on page 275 with reference to the payment of attorney's fees:

"Obviously Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs. There is nothing in the Act that limits the compensation to the services rendered by the attorney in the District Court; nor would one expect to find a limitation in the statute that would free a defaulting employer from liability for any part of the services rendered by the attorney in order to secure his client's rights."

The court further stated as to the right of the trial court to assess the additional fees for services in appellate tribunals:

"The Fair Labor Standards Act directs that the District Court shall allow the fee in addition to the judgment; and while the allowance of an additional fee for appellate work may not be beyond the authority of the appellate court, the Act does not forbid the District Court to award such additional compensation in case the appellate courts have not been asked and have not undertaken to do so. Indeed the ordinary and effective procedure in the allowance of attorney's fees in litigation which proceeds through several courts is to place the responsibility on the trial court where the work begins and ends and the value of the entire service can be best estimated after it has been completed."

The court stated on page 276 as to whether or not the allowance of fees would enlarge the mandate of the reviewing court:

"The provisions of the mandate of the Supreme Court do not interdict the allowance of an additional fee by the District Court; the mandate merely provides that the District Court shall conduct such proceedings as may be required to give effect to the judgment. The allowance of an additional fee does not disturb or enlarge the judgment to which the Supreme Court has given its sanction. The matter of an additional fee was not considered by that court and consequently the present application does not fall within the rule that on a mandate of affirmance from the Supreme Court the District Court has no power to rescind or modify what has been established but can only record the mandate and proceed with the execution of the decree that has been affirmed."

The provisions of the Fair Labor Standards Act being substantially the same as the Emergency Price Control Act, makes this decision of the Circuit Court of Appeals stand out as a very strong pronouncement of the law involved in the case now before this court.

Our opinion is further supported by the provision in the original judgment order expressly reserving jurisdiction in the trial court to allow attorney's fees for future services in the event of an appeal from the order. In the case of Glanz v. Wisniewski, 301 Ill. App. 520, the court said on page 522:

"When plaintiff prosecuted the appeal he knew that it would be necessary for the receiver to hire an attorney for the purpose of sustaining the order appealed from. The decisions of our courts of review point out that solicitors' fees for services rendered in such courts of review cannot be considered there because of lack of original jurisdiction. Such decisions suggest that applications for fees for services rendered in the appellate tribunals be filed and considered in the trial courts. The chancellor could not allow fees for services rendered on the appeal until the appeal was prosecuted. He could not anticipate that plaintiff would appeal. We are of the opinion that the chancellor retained jurisdiction to award reasonable fees for services rendered in the Appellate and Supreme Courts."

After careful consideration of the language of the Emergency Price Control Act and the cases above cited, we are of the opinion that the trial court had jurisdiction to enter a judgment for additional attorney's fees.

We must now decide whether the allowance of the sum of \$5,750.00 for such additional attorney's fees is excessive. The excess rent paid was \$1,320. Plaintiff was allowed in the original proceedings triple damages or \$3,960.00 and \$500.00 attorney's fees. With the additional allowance, the total attorney's fees would be \$6,250.00 for collecting \$3,960.00. The Emergency Price Control Act provides for "reasonable attorney's fees." An examination of the record reveals that defendant, a lawyer, resorted to every legal technicality at his command. This necessitated the expenditure of a far greater amount of time on the part of counsel for the plaintiff than would be necessary or usual in the ordinary case, and the statute clearly contemplates that defendant should pay the cost of such services.

A fair yardstick for attorney's fees is "What would a litigant be reasonably required to pay for services in a case of similar magnitude."

An additional fee of \$5,750.00 is excessive.

We are of the opinion after considering all the factors involved in this litigation that the additional sum of \$2,500.00 is the maximum that can be allowed for the collection of \$3,960.00.

The judgment heretofore entered by the Superior

-7-

Court in the sum of \$5,750.00 as and for additional attorney's fees in this case will be reduced to \$2,500.00. In all other respects the order of the trial court will be affirmed.

Order affirmed.

Schwartz, J., concurs.

Tuohy, P. J., took no part.

24 A

45358

HARRY WIZA,)
Appellant,)
v.) APPEAL FROM SUPERIOR COURT,
DOROTHY OSUCH et al.,)
Appellees.) COOK COUNTY.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT. 344 I.A. 547²

Plaintiff, Harry Wiza, appeals from an order of the Superior Court of Cook County sustaining motions of defendants Dorothy Osuch, Walter Osuch, Michael Beckman, Stanley Beckman, Mary Kopinski, Louis Kopinski, and Louis Kopinski, Jr., to strike plaintiff's second amended complaint and dismissing said defendants from the suit. The remaining defendant, Catholic Bishop of Chicago, doing business as Resurrection Cemetery, filed an answer and is not a party to this appeal.

Plaintiff alleged that he was the lawfully adopted son of Alice and Stanley Wiza; that the said Alice Wiza died in April of 1936, leaving her surviving her husband, the plaintiff, and defendant Dorothy Osuch, the natural daughter of Alice; that prior to her demise Alice Wiza had frequently expressed a desire that upon her death her remains be interred in a certain lot No. 52 in Resurrection Cemetery in Cook County, Illinois; that title to the lot in question was acquired by Alice Wiza's mother, Teodora Olender, from the Catholic Bishop of Chicago by a deed which granted "an easement in and the right of burial in said lot of the remains of Teodora Beckman, also known as Teodora

Beckman Olender, and her heirs"; that Stanley Wiza, husband of Alice, died October 13, 1947, leaving him surviving plaintiff and defendant Dorothy Osuch, and that prior to his death he expressed a desire that he be buried "beside the remains of his deceased wife"; that following the demise of Stanley Wiza, the defendant Dorothy Osuch and the defendants Walter Osuch, her husband, Michael Beckman, Stanley Beckman, Mary Kopinski, Louis Kopinski and Louis Kopinski, Jr., went to the superintendent of the cemetery announcing that they were the only heirs of Teodora Beckman, and that they desired to disinter the remains of Alice Wiza and to have the remains reburied in another lot in the same cemetery (together with the remains of her deceased husband Stanley); that at this time the cemetery authorities possessed certain documents indicating that plaintiff was one of the heirs of Teodora Beckman and showing the plaintiff to have "equal authority and right to the use, control and supervision of said lot * * * as was had or possessed by the other heirs at law of Theodora Beckman"; that notwithstanding this fact and in violation of his express wishes and desires, all of the defendants conspired to bring about the reburial of the remains of Alice Wiza. It was further alleged that any protest or objection he might have desired to make to the plan of reburial would have been futile, unsuccessful and wholly unavailing, and "in addition would have been indecent, unseemly, extremely discourteous * * * and would undoubtedly have caused a furor and a fist fight * * *"; that the actions

of the defendants in ordering the disinterment of the remains of Alice Wiza caused plaintiff to become tense and irritable, and caused him great mental and physical anguish for a long period of time; that the actions of defendants were wilfully, wantonly and maliciously done, and "violated his rights as a child of Alice Wiza and his rights and his interests in Lot 52 as an heir at law of Theodora Beckman"; that after he had recovered from the effects of the action of the defendants he called upon the defendants Dorothy Osuch and Catholic Bishop of Chicago, demanding that the remains of Alice Wiza and Stanley Wiza be removed from the lot where they had been buried and be reburied in lot 52, but that the defendants had failed and refused to do so; that as a result of these wrongs plaintiff has suffered mental anguish and loss in his business, occasioning damages to the extent of \$20,000. Plaintiff asks that the defendants be ordered to bring about the reinterment of the bodies and that a court of law fix damages in accordance with the prayer of the complaint.

The motions to strike asserted that the complaint stated no cause of action, and the trial court upheld this contention. We are of the opinion that no error was committed in this respect. Plaintiff, an adopted child, proceeds upon the erroneous theory that he was an heir at law of his adopting mother's mother, Teodora Beckman Olender. He was an heir of his adopting mother Alice Wiza, but that fact clothed him with no legal rights which are here involved. In the selection of a burial site upon which Alice Wiza's daughter and

her other relatives apparently agreed, even though it was a site opposed to that approved by plaintiff, no legal rights of plaintiff were thereby violated. It appears from the pleading that the daughter and other heirs wished a larger lot where Alice, Stanley, and possibly others in the family would be interred in close proximity, and that this decision was arrived at without the consent of plaintiff. Under the circumstances there was no legal duty to abide by the wishes of this single relative where the other relatives were apparently agreed upon a different course of action. This is particularly true where the plaintiff made no attempt to interfere with the interment until after the reburial had been accomplished. There being no legal duty owed him, it follows that there was no violation of his rights; and the injuries, real or fancied which he set forth at great length in the complaint, are not subject to legal redress.

The judgment order of the Superior Court is therefore affirmed.

Judgment order affirmed.

Schwartz and Robson, JJ., concur.

25 A

45388

MAE S. BURTON (Mrs.)	
C. K. Burton),)	
Appellee,	)	APPEAL FROM CIRCUIT COURT,
)	
v.	)	COCK COUNTY.
)	
RUSSELL FIREBAUGH,)	
Appellant.	)	344 I.A. 348 ¹

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This was an action in forcible detainer filed by the plaintiff (appellee) to recover possession from the defendant (appellant) of an apartment in Oak Park, Illinois. Plaintiff desired to procure the premises as housing accommodations for her daughter and was given the requisite certificate of the Area Rent Director. The action was tried before a jury after appeal from the decision of a Justice of the Peace. The trial court directed a verdict for the plaintiff. This is an appeal prayed from the judgment entered thereon.

At the trial defendant called an employee of the Area Rent Director as a witness to testify to the maximum rent for the apartment in question. The court sustained objection to the materiality of the testimony. An offer of proof was made that plaintiff collected \$100.00 as rent while the maximum rent allowed under the Rent Control Act was \$75.00. This would make an alleged total overpayment of \$855.

Defendant contends that the court erred in refusing to allow this testimony, that if there was an overcharge, then as a condition to plaintiff's maintaining her action she would be required to make restitution of such overcharge,

or in the alternative defendant should be allowed to remain in possession of the premises until the amount of the overcharge was realized on future rent.

The forcible Entry and Detainer Act, chap. 57, sec. 5, of the Illinois Revised Statutes provides in part as follows:

109,267

"* * * No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim, or otherwise * * *."

It is well-settled in Illinois that in actions of forcible detainer the sole question involved is the right to possession of the leased premises. Sauvage v. Oscar W. Hedstrom Corp., 322 Ill. App. 427; Woodbury v. Ryel, 128 Ill. App. 459; Van Winkle v. Weston, 276 Ill. App. 66. It is also well-settled in Illinois that in actions of forcible detainer no cross demand in the nature of recoupment can be interposed by way of defense. Sauvage v. Oscar W. Hedstrom Corp., supra; Geiger v. Brown, 167 Ill. App. 534.

Plaintiff met the requirements of the Rent Control Act in obtaining the necessary certificate to commence her action. When she filed her suit local laws governed. After consideration of the statute and the above decisions, we are of the opinion the ruling of the trial court was correct. The excess rent, if any, paid by defendant cannot be considered as a defense to the present action. Defendant's right to recover the overcharge, if it exists, is by a separate special action under the terms of the Federal Rent Control Act.

Judgment affirmed.

Tuohy, P. J., and Schwartz, J., concur.

45396

ROBERT E. DOWLING,)
Appellant,)

v.)

PHILIP M. LACEY and)
GENE LACEY, d/b/a)
Lacey Bros.,)

Appellees.)

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

3441.1. 348²

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action by the plaintiff to recover money due from defendants for store rent, for water consumed, for furniture and fixtures lost and converted by defendants, for replacement and repair of broken window panes and frames, and failure of defendants to restore the premises to a condition of good tenantable repair.

On July 18, 1950, based on affidavits of the plaintiff (appellant), the court entered an order for summary judgment in the sum of \$1,918.23. On August 11, 1950, defendants (appellees) filed their motion to vacate the judgment entered on July 18. This motion was continued from time to time and came up for hearing on September 14, 1950. The court, after a hearing, entered an order vacating the judgment entered on July 18 and granted defendants leave to file their affidavits to plaintiff's motion for summary judgment and thereafter denied plaintiff's motion for summary judgment. Plaintiff thereafter filed his motion to vacate the order of September 14, 1950, which was denied. Plaintiff appealed from the order of September 14, 1950, contending that defendants' motions and affidavits

to vacate the summary judgment were insufficient and did not meet the requirements of Rule 15 of the Illinois Supreme Court and Section 57 of the Illinois Civil Practice Act. Defendants filed their motion to dismiss the appeal on the grounds that the order entered by Judge Fisher was interlocutory and not a final order and therefore not appealable.

If defendants' motion is proper, it will not be necessary for us to consider plaintiff's contentions. Section 50 (7) of the Civil Practice Act of Illinois states:

"The court may in its discretion, before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable."

An examination of the complaint and affidavits filed by the plaintiff and defendants indicates that the suit is of a highly controversial nature. The affidavits filed by the defendants show on their face a meritorious defense and diligence in the filing of their motion. In the case of Wolf v. Proviso Hospital Association, 309 Ill. App. 479, a default judgment was obtained against the defendant on June 15 and on July 14 defendant filed its petition to vacate the judgment, which, after a series of continuances, was vacated by order of court on November 7, 1939. Plaintiff appealed from the order and defendant moved to dismiss the appeal. This court said on page 484:

"Under the circumstances, the court had jurisdiction to vacate the judgment upon a sufficient showing, and

its order of November 7, 1939, was not a final order. The courts so held under similar circumstances in Cramer v. Illinois Commercial Men's Ass'n, 260 Ill. 516; Walker v. Oliver, 63 Ill. 199; Town of Magnolia v. Kays, 200 Ill. App. 122. In these cases orders setting aside defaults and vacating judgments in order to allow defenses, were held to be interlocutory. The reason underlying these decisions is well expressed in City of Park Ridge v. Murphy, 258 Ill. 365, wherein a default judgment was taken against certain real estate owned by Murphy, who subsequently moved to vacate on the ground that proper service had not been had upon him in accordance with the provisions of the statute, and the court said, 'upon a re-trial of the case the court may re-enter the same judgment or modify it or render an entirely different judgment, but until such final judgment is rendered there is no final disposition of the case within the meaning of the statute which allows appeals and writs of error to review final judgments.' These decisions hold that a judgment, to be final, must terminate and completely dispose of the action, but that an order vacating a judgment and allowing the defendant to appear and defend, is not final."

After considering the statute and the decisions we are of the opinion that defendants' motion to dismiss the appeal, being predicated upon an interlocutory and not a final order, should be allowed and it is so ordered. ||

Appeal dismissed.

Tuohy, P. J., and Schwartz, J., concur.

45401

WANDA PIPER,)
Appellant,) APPEAL FROM SUPERIOR COURT,
v.)
COOK COUNTY.
NEIL PIPER,)
Appellee.)

27 A
344 I.A. 549¹

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing plaintiff's suit for separate maintenance for want of equity. The issue is whether plaintiff is living separate and apart from her husband, without her fault. The case reveals a long history of domestic infelicity, bickering, separations, reconciliations, and litigation. There were charges of cruelty and "another woman," unsupported by any substantial evidence and, in fact, not seriously relied upon. In April, 1948, plaintiff instituted a suit for separate maintenance, and a ne exeat order was issued on plaintiff's petition. This suit was dismissed and the parties resumed their life together. April 17, 1950, plaintiff instituted the instant suit, and again sued out a writ of ne exeat, which was served on defendant at the home of the parties.

The evidence is scanty. Plaintiff testified that defendant struck her in May, 1947, but it is to be borne in mind that there was a reconciliation in 1948. She testified that they never quarreled until "this woman came into our home." She testified to nothing, however, on which misconduct could be predicated. In fact, reading the abstract, the chancellor seems to have had the impression that plaintiff's suspicions arose out of unwarranted jealousy.

It appears that there was some argument over rent money which it was claimed was owing plaintiff's mother, and defendant left on the morning of April 17, 1950, without saying good-bye; that when he returned in the evening, deputy sheriffs were waiting for him and plaintiff said, "There's company here for you Neil." There is some other evidence of quarrels, threats to leave, and actual separations from time to time, with ensuing reunions. There is testimony to conversations in which defendant manifested a desire to be a good husband. It was admitted that he slept in the house the nights of April 16 and 18. Mrs. Piper's mother testified, among other things, that Mrs. Piper told her husband that if he was not going to be any different than he had been in the past, she wanted him to get out that night (April 15, 1950), "* * * but you must leave your clothes here until you pay your bills." A daughter testified there were many acts of cruelty, but did not specify dates nor give details. She said that after her father returned home upon the occasion of the last reconciliation, "He was very quiet when we were around." William R. Cook testified that Mrs. Piper told him she had Neil arrested Monday and that he had been there (presumably meaning their home) the last couple of days; that he would just have to take his clothes and get out, as she couldn't stand it any longer.

The court after hearing this evidence came to the conclusion that plaintiff was not living separate and apart from her husband, without her fault, at the time suit was instituted and therefore the case should be dismissed. The court

heard the evidence and observed the witnesses and that gave him a decided advantage in arriving at a correct factual conclusion over those who have before them only the cold and often deceptive printed page.

It is argued by plaintiff that even though there was no actual physical separation at the time suit was filed, nevertheless, the threats to leave were sufficient to warrant institution of the suit and that it was not necessary for plaintiff to wait until defendant had actually left, as that might frustrate the very purpose of such a suit. There may be circumstances under which this would be a valid argument. However, not every threat or act of cruelty or misconduct can justify a suit for separate maintenance. If this were not so, there would be few instances in which at sometime or another a spouse would not have grounds for separate maintenance. It is for the chancellor to determine whether the strain on the marital ties thus caused was of such grave importance as to support the allegation of separation without fault, and unless his finding is against the manifest weight of the evidence, it will not be disturbed by a reviewing court. Abraham v. Abraham, 403 Ill. 312; Push v. Push, 316 Ill. App. 295; Marcy v. Marcy, 400 Ill. 143.

Plaintiff argues that the parties were actually living separate and apart at the time the amended complaint was filed. The test, however, is whether they were living separate and apart at the time of the filing of the complaint. The date of the separation alleged in the amended complaint

was April 17, 1950. If, as the chancellor appears to have found, plaintiff was not justified in suing out a writ of ne exeat and having her husband put under arrest, then certainly it could not be expected that he would continue to live with her while that suit was pending. In Floberg v. Floberg, 358 Ill. 626, at page 629, the court referring to a separate maintenance action said that such action "corresponds with the divorce of a mensa et thoro, which was the only kind of divorce granted by the ecclesiastical law. The general rule is where a suit for divorce is brought and the same is pending between the parties to the marriage contract, the parties are not only justified in living apart but necessarily must do so. Such living separate and apart does not constitute willful desertion without reasonable cause within the meaning of the Divorce act. It would be incompatible with a pending suit for the dissolution or modification of the marriage contract for the parties to live together. If the suit is carried on bona fide, it is not incumbent, during its pendency, upon either party to resume the marital status. The time so consumed by the litigation cannot be reckoned in the calculation of the statutory period of desertion. The rule applies alike to pending proceedings for separate maintenance under the statute and for divorce. It is "time out." (Citing many cases.)

Decree affirmed.

Tuohy, P. J., and Robson, J., concur.

35

A

45237

NELLIE JEFFRIES,
Plaintiff - Appellee,
v.
GEORGE C. ADAMS,
Defendant - Appellant.

}
} APPEAL FROM
}
} CIRCUIT COURT,
}
} COOK COUNTY.

344 I.A. 549²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery suit. On March 16, 1950, the cause was dismissed for want of prosecution. On April 18, 1950, plaintiff's motion to vacate was sustained, the order of dismissal set aside and the cause reinstated. Defendant has appealed from the order of April 18.

No brief has been filed by the plaintiff-appellee, On September 26, 1950, in the Second Division of this court, appellee was given twenty days from that day in which to file briefs. No motion was made within that period for an extension of time. The time in which to file a brief has accordingly expired.

The question is whether the court had jurisdiction to enter the order vacating the order of dismissal.

The motion to vacate was in the nature of the writ of error coram nobis since the reason advanced was that the court would not have dismissed the cause on March 16, 1950 had it then known the matter was then pending before the master in chancery. This is a chancery case and a motion in the nature of the writ of error coram nobis is not the appropriate action to secure reinstatement of the cause.
Frank v. Salomon et al., 376 Ill. 439.

More than thirty days had elapsed since the entry of the order of dismissal when plaintiff's motion to vacate was filed. In the affidavit supporting the motion to vacate, plaintiff states that on March 24, 1950, associate counsel for plaintiff had a motion to vacate the dismissal order entered, but "was unable to get file." This indicates that plaintiff had notice in due time of the dismissal order. Defendant's praecipe for the trial court record directed the circuit court clerk to include the "notice of motion" filed March 24, 1950. The clerk certified that that "item" is not of record. The inference is that plaintiff abandoned the motion which was entered in due time and thus failed to continue the court's jurisdiction beyond the thirty day period.

We conclude that the order of April 18, 1950 vacating the order of March 16, 1950 was void for want of jurisdiction. (Barnard v. Michael et al., 392 Ill. 130, 135.)

The order is reversed.

ORDER REVERSED.

LEWE AND FEINBERG, JJ. CONCUR.

36

A

45457

ELVIN V. ERICKSON,	)	APPEAL FROM
)	
Appellant,	)	SUPERIOR COURT,
)	
v.)	
)	
LILY R. ERICKSON,	)	COOK COUNTY.
)	
Appellee.)	

344 I.A. 550¹

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a child custody proceeding. The parties were divorced at the plaintiff's suit February 4, 1946. The decree provided that plaintiff should have custody of the minor son of the parties, subject to limited custody privileges of the defendant. Several subsequent orders modified the decretal custody provisions. The appeal is from a modification order of December 19, 1950.

The parties were married in May, 1937. Bruce, the son, who was about 11 at the time of the hearings in the instant proceedings was the only child of the marriage. In the divorce decree, defendant was found guilty of adultery. The decretal order for custody was based on an agreement of the parties under which the defendant was to have custody "at least one day" each week. On July 12, 1946 the custody provision was modified to give defendant custody for a week in August of that year. On October 14, 1946 a further modification gave defendant custody on Saturday and Sunday of alternate weekends and on alternate holidays "as agreed by the parties." On July 8, 1949 upon agreement of the parties, a further modification gave defendant custody from July 8 to July 10, and from July 15 to July 17, and gave her leave to take Bruce to Wisconsin from July 22 to July 31.

In January, 1950 defendant petitioned the court for a further modification to give her custody on Saturday and Sunday of every weekend, the entire month of July each year, two week nights each week, and to clarify the provision for holiday custody. In an amendment to the petition, she prayed for exclusive custody on the basis of the allegations in the original petition. While the issues made on the petition and amendment were pending, a modification order was entered on June 8, 1950, by agreement of the parties, which gave custody to defendant during her summer vacation from July 17 to July 30, and on alternate weekends. The order appealed from was based on hearings on the issues made by defendant's petition as amended. Its pertinent provisions were that defendant should have custody three consecutive weekends out of every four, and during August and on Mother's Day of each year. Defendant failed to obtain exclusive custody or the privilege of visitation at night during the week.

The parties agree that the chancellor had the power to modify the decretal provision, that the welfare of the child is the principle which is the test of the propriety of the exercise of the power, and that the decree and each modifying order are final on the conditions then existing, and should not be changed except on altered conditions affecting the welfare of the child. The question on appeal is whether the chancellor abused his discretion in increasing the custody privileges in favor of defendant.

Defendant had the burden of proving that conditions had altered since the decree and previous orders, and that

the changes affected the child's welfare. Maupin v. Maupin, 339 Ill. App. 484. No findings of fact were made in the order from which this appeal was taken. We presume that the court believed that sufficient proof had been made of the allegations in defendant's petition to justify the modification. Defendant alleged that conditions had changed since the decree because, having lived virtuously since that time, she was now fit for increased custody privileges, that her material conditions had improved so as to enable her to afford a suitable home for Bruce, and that her present employment afforded her greater opportunity for vacationing with him.

Plaintiff argues that the proof shows only that defendant's material circumstances have improved, but that it fails to show that these improvements would be for the child's benefit.

There is testimony of two married women, one the mother of a sixteen year old boy, which supports the defendant's allegation of moral fitness. Their testimony of her reputation and integrity is not controverted by other witnesses to defendant's reputation. We believe that plaintiff's testimony of his post-divorce intimacies with defendant are not conclusive on the question of lack of virtue rendering defendant unfit morally. The record shows moreover that plaintiff suggested defendant join him and their son on a vacation as a means of attempting to solve their difficulties and "got together for the benefit of the boy." This would indicate that plaintiff did not consider defendant unfit. We would not be justified in saying that a finding of defendant's moral fitness since the decree was against the manifest weight of evidence.

The father was given custody in the decree and it is admitted that he has been a good father. It is not disputed that defendant is a good housekeeper, and looked after her son's material wants when he was in her custody. So far as material surroundings are concerned, the boy would probably be as well off on weekends in the home of either parent. On the record in this case, we would not be justified in deciding that the chancellor abused his discretion in granting custody to the mother during the month of August each year. The precise question is whether taking Bruce from his father and placing him in his mother's custody for an additional weekend each month is for the child's best welfare.

The facts bearing on this decisive question are undisputed. Bruce is interested in studies, Boy Scout activities, music and sports. During weekends with his father, Bruce goes to a Lutheran church which is three blocks from the father's home and three and one-half or four miles from the mother's home. This is the church which the mother and father attended before the divorce. There is a piano for Bruce's use in the father's home. His father is active in the Parent Teachers Association and participates in weekend sports and Boy Scout activities with his son. The boy's friends are drawn from the neighborhood of the father's home.

Defendant spends her time during weekends on which she has custody providing meals that Bruce likes and seeing that he has entertainment. She takes him to the circus, movies, parks, museums, etc., on excursions to the country, on visits to the homes of friends, and sometimes to a baseball

game. She recently purchased a television set for his use. She supervises his homework. She does not take him to Sunday school.

The father's business takes him away from home two or three days each week. During these periods, the boy is in the sole care of his paternal grandmother in the father's home. She has taken care of him since before the divorce decree. These necessary absences on the part of the father are significant factors in the decision. They give greater importance to the weekends. Since the father was favored in the decree and because of the boy's age, we think a clear showing should be made that increasing defendant's custody will benefit the boy. Is it to the boy's benefit to spend an additional weekend with his mother at the expense of his father's companionship in sports and Boy Scout activities, of the association of his neighborhood friends, and of Sunday school? ✓

There is no doubt that defendant's material circumstances have been altered since the decree was entered. There is no clear showing made and no basis for reasonable inference that the welfare of the boy would be enhanced by granting custody during three successive weekends, instead of alternate weekends. It is important too that a child's routine under proper circumstances be not disturbed too frequently nor without good reason. We think it is important because of the boy's age and the father's participation in the boy's activities that a proper proportion be maintained in the custody ✓

provisions. The weekends lend themselves better than other periods to the father's participation. We think it is important that the neglect of the boy's religious training be not extended to three successive weekends. We believe that these considerations and the taking of the boy from his friends for three successive weekends, offset the advantages which he would gain from three successive, instead of alternate, weekends with his mother.

Since the evidence does not clearly show that the boy's welfare would be improved by the modification order of December 19, 1950, the entry of the order was an abuse of discretion. For that reason, the order is reversed.

ORDER REVERSED.

LEWE, J. AND FEINBERG, J. CONCUR.

45317

FRANK BORUCKI and ANNA BECZAK,)

Appellants,)

v.)

ROBERT McLAUGHLIN,)

Appellee.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

34 I.A. 550²

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs instituted an action to recover damages for personal injuries and property damage to the automobile owned by plaintiff Frank Borucki, with whom the other plaintiff was riding as a guest, arising out of a collision between the automobiles driven by Borucki and defendant. A jury trial resulted in verdicts in favor of defendant. Plaintiffs' motions for a new trial were overruled and judgments entered accordingly. Plaintiffs appeal. Plaintiffs and defendant were the only occurrence witnesses. There is a sharp conflict in the testimony.

April 3, 1947 at about 8:00 o'clock p.m. Frank Borucki, accompanied by Anna Beczak, parked his automobile at the north curb of Irving Park Road facing west and about fifteen feet east of a railroad viaduct which intersects the Road at this point in the City of Chicago. Irving Park Road is 59 feet wide from curb to curb and has two street car tracks in the center thereof. The distance between the street car tracks and the curb is 22 feet. About fifteen feet east of the viaduct Irving Park Road narrows about two feet. This narrowed portion of the Road extends about fifteen feet to the

west of the viaduct, and between these points where Irving Park Road passes under the viaduct the roadway is depressed about two or two and a half feet.

After parking his automobile Borucki did some shopping with Mrs. Beczak at a nearby department store. After shopping plaintiffs returned to the parked automobile about 9:25 p.m. that evening. Borucki started the motor and drove his automobile backwards about ten feet along the curb and then proceeded to make a U turn on Irving Park Road. When the front of Borucki's automobile was in the eastbound street car tracks and the rear of his automobile two feet back of the westbound tracks it was struck on the left rear side by defendant's automobile. As a result of the impact plaintiffs were thrown onto the street, causing the injuries here complained of.

Plaintiffs' evidence tends to prove that both plaintiffs looked to the east and saw no westbound traffic before Borucki commenced to make the U turn in Irving Park Road; that during the turn Borucki's automobile was traveling six or seven miles an hour. Mrs. Beczak testified that she continued to look to the east as Borucki turned his car slowly to the south; that when she first saw defendant's automobile it was 175 feet east, traveling 45 or 50 miles an hour; that as defendant's automobile came closer Mrs. Beczak warned Borucki; and that defendant did not blow a horn nor give any other signal of his approach before the impact.

According to Borucki's testimony, after his car had faced south and when it was about twenty feet from the north curb of the Road he saw defendant's car about 175 feet to the east, and that the collision occurred after Borucki's car had traveled another twenty feet to the point of impact. On cross examination Borucki admitted that immediately after the occurrence he had told a police officer that defendant's automobile was about a hundred feet away when he first observed it.

Defendant testified that he entered Irving Park Road at Kostner Avenue from the north; that he was driving west in the center lane ^{next} to the street car tracks; that he did not see Borucki's car until he was within 30 feet of it; that there were other cars parked on the north side of the boulevard back of Borucki's automobile; that when he first saw Borucki's automobile it was "creeping along the curb, going west"; that when the witness approached the viaduct he turned into the street car tracks; that when Borucki's car reached the viaduct he suddenly turned his automobile south directly into the path of the defendant's automobile; and that the automobiles involved collided underneath the viaduct.

A police officer of the Accident Prevention Bureau of the City of Chicago testified that when he came to the scene of the accident both automobiles were under the east side of the viaduct on the north side of the Road.

Plaintiffs contend that the trial court erred in giving an excessive number of instructions for defendant

and in admitting irrelevant and incompetent testimony. Nineteen instructions were given at the request of defendant and six at the request of plaintiffs. Eight instructions given on behalf of defendant in effect directed the jury to find defendant not guilty. Six of defendant's given instructions related to contributory negligence. All of these instructions were substantially the same and we think placed undue emphasis on the question of contributory negligence. (Chism v. Decatur Newspapers, Inc., 340 Ill. App. 42; City of Lake Forest v. Janowitz, 295 Ill. App. 289.) There were also three instructions given at defendant's request which repeated plaintiffs' duty to prove their case by a preponderance of the evidence. These instructions might well have created in the minds of the jury the impression that the trial court intended that this proposition should be particularly emphasized.

Criticism is also leveled at defendant's instructions 4, 6, and 22. Instruction number 4 incorporates the language of sections 161, 162, 163 and 164 of chapter 95 1/2 Illinois Revised Statutes 1949, State Bar Assn. Edition, ~~except~~ paragraphs (b) and (c) of section 162. Section 162 provides:

"No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement."

Paragraph (b) of section 162 (which is omitted from this instruction) provides:

"A signal of intention to turn right or left shall be given during not less than the last one hundred feet traveled by the vehicle before turning."

In our opinion section 162 is not applicable to the facts in the present case and should not have been given for the reason that this section clearly contemplates vehicles traveling in a direct course and for at least a distance of one hundred feet or more before making a turn. Here the evidence shows that Borucki's automobile did not travel the required one hundred feet in a direct course before making a turn but proceeded to make a sharp turn almost immediately after leaving the north curb of Irving Park Road.

Instruction 6 is in the language of an ordinance of the City of Chicago which is substantially the same as the provisions of section 161 of chapter 95 1/2 and is therefore repetitious.

Instruction 22 is peremptory in form and again unduly stresses the requirement that a motorist before turning his vehicle must give notice to "approaching traffic from behind" by raising his hand and indicating an intention to turn.

The trial court is not required to give more than one instruction on a particular subject. Moreover, the practice of giving excessive instructions has often been condemned. See Baker v. Thompson, 337 Ill. App. 327. Defendant says that the instructions were necessary for the reason that different legal principles governed the actions of each plaintiff. We cannot agree. The issues presented were simple. Under the circumstances shown there was no

justification for the **repetition** of the same legal principles.

On direct examination defendant stated that he had been driving automobiles for about seven years and that he drove motor vehicles while in military service. Over plaintiffs' objections he proceeded to tell the jury when and where he drove cars while in the armed forces. Defendant testified that he drove military vehicles "under combat conditions" at "beach head invasions" in Sicily and at Tarawa in the Pacific. Plaintiffs insist that this testimony was incompetent and bound to excite sympathy for the defendant. Proof of defendant's skill and experience was competent (Fowler v. Chicago Rys. Co., 285 Ill. 196) but we think that part of his testimony relating to his driving of military vehicles while in the military service was not only incompetent but erroneously prejudicial to plaintiffs, and therefore should have been excluded. See Biniakiewicz v. Wojtasik, 339 Ill. App. 574.

The record further shows that defendant's counsel interrogated Borucki at great length about a book titled "Rules of the Road" issued by the Secretary of State of Illinois, which Borucki said he had read. This examination related primarily to Borucki's knowledge and interpretation of certain sections of the rule book pertaining to hand signals signifying a motorist's intention to make a turn before starting his automobile while parked at the curb. Whether Borucki read the rule book or construed the rules properly was irrelevant, since it was not an issue in the case.

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For the reasons given, the judgments are reversed
and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR NEW TRIAL.

KILEY, P. J., and FEINBERG, J., Concur.

38 A

45562

CHARLES G. DITIS,

Appellee,

v.

AHLVIN CONSTRUCTION CO., INC.,
a corporation, et al.,

Defendants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

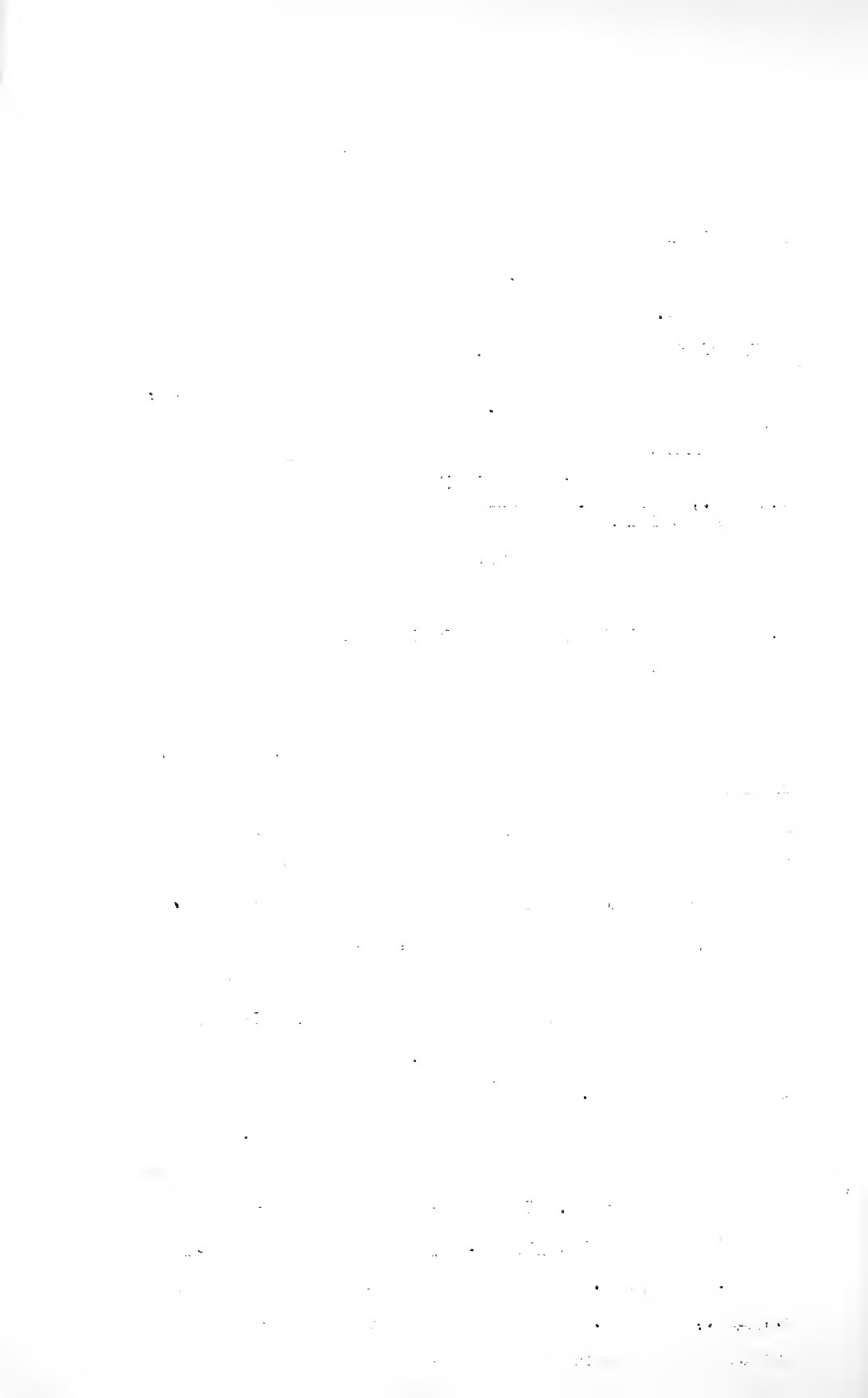
On Appeal of AHLVIN CONSTRUCTION
CO., INC., VERNON E. CROSELL and
JORGEN HUBSCHMAN,

Appellants.

344 I.A. 551

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order appointing a receiver. In 1942 the Construction Company contemplated the erection of dwelling houses in Cook County, Illinois. Pursuant to a resolution passed by the board of directors of the Construction Company, it entered into a contract with Ditis to pay him for his services 37½ per cent of the net profits derived from the sale of dwelling houses erected by the Construction Company, or, in the event they were not sold, then 37½ per cent of any and all equities that remained in any of the unsold houses. The Construction Company erected 97 dwelling houses. The first 16 houses completed were sold. Afterwards 81 houses were completed and rented except one occupied by plaintiff Ditis. These houses were sold by the Construction Company to defendants Hubschman and Crosell. This court affirmed a decree entered in the Circuit Court (Ditis v. Ahlvin Construction Co., Inc., 339 Ill. App. 378). Upon appeal (Ditis v. Ahlvin Construction Co., Inc., 408 Ill. 416) the Supreme Court reversed that part of the decree relating to the sale of the dwelling



houses to defendants Hubschman and Crosell. A detailed history of the transaction is stated in the cases last cited. The Supreme Court remanded the cause to the Circuit Court where, by agreement of all the parties, an order was entered which provided in effect that defendants be restrained from making any transfers, sales, assignments, or other disposition of the 97 dwelling houses and the contracts, deeds, agreements, books, records, and other items relating thereto, and from disposing of any of the collections, proceeds, bank accounts, and any money from sales, transfers, or rental of any of said houses, excepting only payments such as insurance premiums, taxes, interest, amortization, etc. Subsequently the chancellor entered the order here appealed from, appointing a receiver and directing him to take immediate possession of the houses involved, except those sold to innocent purchasers, and all of the assets, money, property, books, records, papers and documents arising out of or connected with the enterprise.

As grounds for reversal, defendants urge that there is no present necessity for the appointment of a receiver, for the following reasons: that the injunctional order entered by agreement affords plaintiff ample protection; that the amount due plaintiff, if any, should first be ascertained; and, third, that defendants are able to pay the sums, if any, ultimately found due to plaintiff from them.

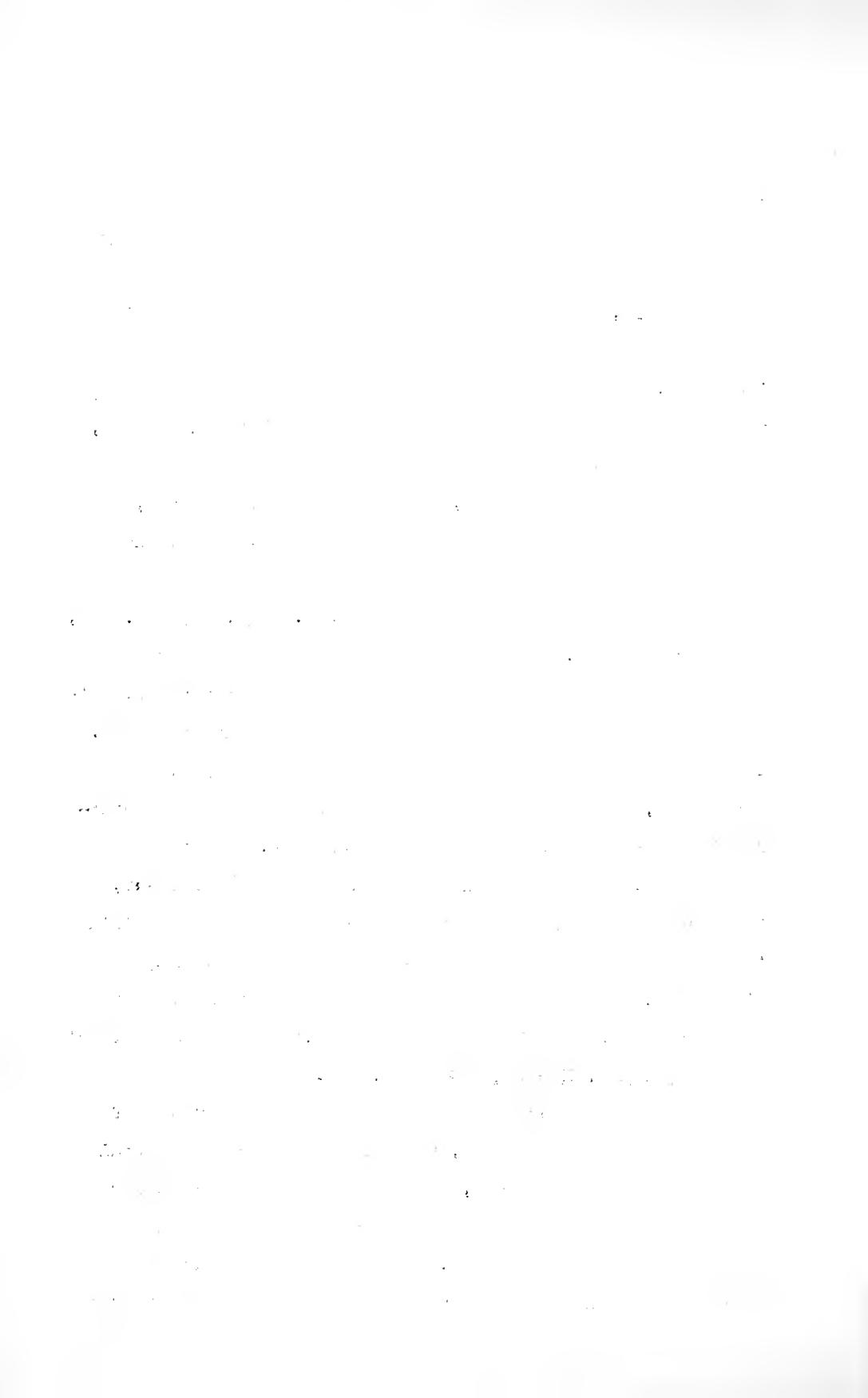
The Supreme Court concluded, in Ditis v. Ahlvin Construction Co., 408 Ill. 416, that the relationship between the parties was that of joint adventurers, and that Ditis was not bound by the purported sale of the dwellings to

defendants Hubschman and Crosell. Because of the fiduciary relationship between the parties, as determined by the Supreme Court, the plaintiff is entitled to a complete disclosure of all matters concerning the enterprise from its inception.

The evidence shows that defendants have always had, and still retain, exclusive possession and control of the dwelling houses in question, all the money from rentals, proceeds of sales, and all the books, records, deeds, and other documents.

In Chicago Title and Trust Co. v. Mack, 347 Ill. 480, the court said (p. 483): "The appointment of a receiver is a branch of equity jurisdiction not dependent upon any statute and rests largely in the discretion of the appointing court. It had its origin in the English court of chancery at an early date, and it was incidental to and in aid of the jurisdiction of equity to enable it to accomplish, as far as practicable, complete justice among the parties before it, the object being to secure and preserve the property or thing in controversy for the benefit of all concerned pending the litigation, so that it might be subjected to such order or decree as the court might make or render." To the same effect see Firebaugh v. McGovern, 404 Ill. 143.

Since the Supreme Court has defined the status of plaintiff as a coadventurer, which has in general the legal incidents of a partnership, and being so closely analogous that their rights and liabilities are usually tested by the rules governing partnerships, defendants are obliged to share with plaintiff any knowledge they have relating to the



enterprise and to make all of the books, records, and other relevant information equally accessible to him. The evidence shows that they have failed to do this. Moreover, plaintiff is entitled to joint possession and control of all the assets, including moneys received from rentals and sales of the houses in controversy. It is not denied that plaintiff was barred from participating in the possession or control of the assets of the venture. Under the circumstances shown by the record we think the chancellor was warranted in appointing a receiver.

For the reasons given, the order appealed from is affirmed.

ORDER AFFIRMED.

KILEY, P.J. AND FEINBERG, J. CONCUR.

45354) Consolidated
45355)

JOHN OLENDER,
Appellee-Cross Appellant,

v.

JAMES GOTTLIEB, d/b/a WESTERN TRANSPORTATION COMPANY,
Defendant-Appellant,

and

CHICAGO TRANSIT AUTHORITY, a municipal corporation,
Defendant-Appellee

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

344 I.A. 552

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

John Olender filed a complaint in the Superior Court of Cook County against James Gottlieb, doing business as Western Transportation Company, and the trustees and receivers of the corporation doing business as Chicago Surface Lines for damages for injuries sustained when a streetcar on which he was riding as a passenger for hire collided with a motor tractor driven by Asil Heaton, alleged to be an employee of Gottlieb. Before the trial Chicago Transit Authority, a municipal corporation, was substituted as defendant for the trustees and receivers. A trial by jury resulted in a verdict of guilty against both defendants with damages assessed at \$3,500. The court allowed the Transit Authority's motion for judgment notwithstanding the verdict, but denied its motion for a new trial. Gottlieb's motions for judgment notwithstanding the verdict and for a new trial were denied. Gottlieb appeals from the judgment against him and plaintiff appeals from the judgment in favor

of the Transit Authority. The appeals have been consolidated.

The mishap occurred shortly after 7:00 a.m. on February 8, 1947, near the intersection of Archer and Lowe Avenues in Chicago. Archer Avenue runs in a southwesterly and northeasterly direction. Lowe Avenue runs south from Archer Avenue, forming what is called a "T" intersection. Emerald Avenue runs into Archer Avenue from the south a block west of Lowe Avenue, while Halsted Street, another north and south highway, intersects Archer Avenue a block west of Emerald Avenue. Immediately to the north of Archer Avenue there is a railway right of way, the tracks of which are elevated. Archer Avenue bends slightly to the south at Lowe Avenue as one drives in a northeasterly direction. There are two lines of street railway on Archer Avenue located in the center of the street, the one to the north being for southwestbound traffic and the one to the south for northeastbound traffic. There are two safety islands at the intersection of Archer and Lowe Avenues. The safety island for the southwestbound traffic is north of the streetcar tracks and east of Lowe Avenue. The safety island for the northeastbound traffic is south of the streetcar tracks and west of Lowe Avenue. The collision occurred at or near the southwest end of the safety island located west of Lowe Avenue.

At about 7:00 a.m. plaintiff walked from his home and boarded a two-man northeastbound streetcar at the intersection of Archer Avenue and Throop Street about half a mile west of Halsted Street. He paid his fare, walked



towards the front and stood on the front platform in back of the motorman. The streetcar made a stop at Halsted Street, after which it continued northeast on Archer Avenue. The mishap occurred when the streetcar struck a tractor driven by Asil Heaton. The tractor had been moving southwest on Archer Avenue and was either turning south into Lowe Avenue or making a "U" turn. As a result of the collision the driver of the tractor lost his life.

Plaintiff maintains that the verdict against the Transit Authority is fully supported by the evidence and that the court erred in allowing the motion for judgment notwithstanding the verdict. The Transit Authority contends that there is no probative evidence fairly and clearly tending to prove a cause of action against it. This defendant as a common carrier owed to plaintiff as a passenger the duty to use the highest degree of care commensurate with the practical operation of its railway. It is undisputed that plaintiff was in the exercise of due care and caution for his own safety. The trial judge necessarily decided as a question of law that all reasonable minds would agree that this defendant was not negligent. We are asked to decide whether there is in the record any evidence which, standing alone, and taken with all its intendments most favorable to the plaintiff, tends to prove the material elements of his case against the Transit Authority. Lindroth v. Walgreen Company, 407 Ill. 121.

Sam Salemi, a witness for plaintiff, testified that on the morning of the occurrence while on his way to

work he got off a Halsted Street car at Archer Avenue; that he crossed to the northeast corner of that intersection intending to continue his journey on a southwestbound streetcar or a truck of his employer; that he was walking on the Archer Avenue sidewalk in a northeasterly direction; that "it was a clear day, but kind of slippery on the streets"; that there is a safety island at the north side of Archer Avenue and east of Halsted Street; that when he was about 200 feet east of this safety island and looking northeast he saw the occurrence; that "that would bring" witness about 200 feet from Lowe Avenue; that he saw the "truck" trying to make a turn; that when he first saw the vehicle it was coming west towards witness; that it was apparently making a "U" turn around the safety island at Lowe Avenue; that it was traveling to the right of the streetcar line before it started to make the turn; that when he saw the "truck" making the turn he also noticed the streetcar about 200 feet away from the "truck"; that "all of a sudden" he saw the streetcar hit the "truck" and throw it up in the air; that he saw the "truck" come down; that he saw the streetcar hit the tractor "again and keep on going"; that the streetcar did not stop until it had gone 50 feet beyond the safety island; and that the "truck" made almost a complete turn before the streetcar hit it. Witness testified that the tractor was traveling "5 to 10 miles an hour making a turn"; that when he first noticed the streetcar it was 200 feet from the tractor and going between 20 and 25 miles an hour; that between the time he first saw it until the crash occurred, he did not notice any speed change; that he did not hear any

bell or horn sound; and that he did not notice that the motorman applied his brakes. Witness testified further that he is familiar with the area of the occurrence; that Halsted Street is between 500 and 550 feet from Lowe Avenue; that "the accident happened in between Emerald and Lowe Avenue there somewhere"; that there is a safety island "right on Lowe Avenue"; that "that is where the accident wound up"; that "the accident happened before the safety island which is on the south side of the street at Lowe Avenue"; and that it happened "in between there and over here up towards Halsted Street." Charles Winkler, called by plaintiff, testified that he is a police officer for the City of Chicago, assigned to the Accident Prevention Division; that he arrived shortly after the occurrence; that the streetcar was "perhaps half way out in that intersection some distance beyond the safety island," headed northeast; that the tractor was at the southwest end of the island; and that the tractor had the name "Western Transportation" on it.

James Moretti, the motorman, testified that there was no traffic directly in front of him or to the right of his car as the car proceeded; that he noticed the tractor traveling west on Archer Avenue; that the street was slippery; that when he first noticed the tractor it was on the north side of Archer Avenue traveling west between the safety island and the curb toward the front end of the safety island on the north side of the street, at which time the streetcar was "maybe 80 feet from the safety island"; that the tractor commenced to skid when it was about 50 feet from the streetcar;

that at this time the streetcar was 50 or 60 feet west of the safety island on the south side of the street; that at that time the tractor was "past the intersection of Lowe"; that "I was about 50 feet away from him when he lost control of it"; that he came across the street broadside; that the tractor was facing north and south and skidded completely across the street; that when witness "saw he was going to hit the front of the streetcar" he "hollered and gave a warning to get off the platform"; that he shut off the power on the streetcar and applied his brakes and that "in the last second" he turned his back to get away from the flying glass and was knocked against the bulkhead or exit door; that the front end of the streetcar was demolished; that the impact "severed the air lines in the guard rails in back of the motorman"; that the controller was down; that there was no power; that "it ~~was~~ knocked back on power again"; that when he noticed "that the car had commenced to move again after it had come to a complete stop" he "hollered for the conductor to pull the pole"; that witness did not stop the car with the controller; that the pole was pulled so that there would be no current with which to operate the motor; and that plaintiff was sitting down and holding his arm. Witness estimated the speed of the tractor as it "slid over on my track" as over 50 miles an hour; that when he first saw the tractor the streetcar was traveling between 15 and 18 miles an hour; that at the time of the impact the streetcar was "practically to a stop"; that the driver of the tractor gave no warning that he ^{was} coming over on my tracks";

that the streetcar traveled about 80 feet after the controller was knocked off; and that when it came to a stop the front end was about the middle of the intersection of Lowe Avenue. He testified further that the safety island is about 16 feet long; that the "conditions of the street for a streetcar were perfect"; that "for an automobile they were dangerous"; that the streetcar was in good condition; that the "brakes were in good shape"; that going at 15 or 18 miles an hour under conditions such as existed that day he could bring the streetcar to a stop within 40 or 50 feet; that after the impact with the tractor his car went 80 feet; that he estimated the tractor weighed about three tons; that most of the damage was done to the right front end of the streetcar; and that when he saw the tractor start to skid 125 feet down the street, he did not immediately apply his brakes, at which time the tractor was traveling on the north side of Archer Avenue.

The collision occurred west of Lowe Avenue and between street intersections where the law affords a streetcar the superior right of way upon that part of the street occupied by its tracks. Pienta v. Chicago City Ry. Co., 284 Ill. 246, 264; North Chicago Electric Ry. Co. v. Peuser, 190 Ill. 67, 70. The law of the road provides that vehicles when passing shall keep to the right of the center of the road. Harrison v. Bingheim, 350 Ill. 269, 272; Sec. 151, Ch. 95-1/2, Ill. Rev. Stats. The motorman was only required to operate his car with reference to perils which reasonably might be expected to occur. To require him to run his car with such caution as to guard against unusual or extraordinary perils

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would be to require him to so operate his car as to prevent the practical operation of the road. Chicago Union Traction Co. v. Browdy, 206 Ill. 615. The danger of collision did not commence and become apparent until the tractor turned to cross the track. Plaintiff places great reliance on the testimony of Salemi, who was more than a block away from the place of the occurrence and not in a position to see and know the distance between the vehicles involved in the mishap. Evidence that has no probative force cannot be considered in passing upon a motion for judgment notwithstanding the verdict. According to this witness, before the tractor made the turn it was traveling on the southwestbound track, or just outside of that track. It is common knowledge that a streetcar track is a little less than five feet wide and that the space between the tracks does not exceed five feet in width. When the tractor turned it traveled not to exceed 20 feet before the streetcar collided with it. According to this witness, while the tractor was traveling not to exceed 20 feet, the streetcar traveled 200 feet, or ten times as far. This would necessarily require the streetcar to travel ten times as fast as the tractor. According to the witness the tractor was going 5 to 10 miles an hour making the turn and the streetcar was going between 20 and 25 miles an hour. Thus, the streetcar was going between two times and five times as fast as the tractor. Under such circumstances it would have been a physical impossibility for the streetcar to travel ten times as far as did the tractor in the same amount of time. This witness also said he did not notice any application

of the brakes or any change of speed of the streetcar and that he did not hear any bell or horn sounded.

The fact that a vehicle traveling on the other side of the street starts to skid does not present a condition of danger to a streetcar operating on the opposite side of the street. Practical operation of a streetcar does not require that the motorman must stop and start his car every time he sees a vehicle on the other side of the street start to skid a little. Until such time as the turning actually occurred, the motorman in the operation of his streetcar was justified in proceeding on the theory that the tractor would stay on its own side of the street. The motorman did not apply his brakes when he saw the tractor start to skid a little when it was 125 feet or more from the streetcar and on the other side of the street. The tractor was 50 feet from the streetcar when the driver of the tractor undertook to make a "U" turn between the intersections or lost control of it and it started to turn and skid toward the track on which the streetcar was being operated. The motor- man testified that he shut off the power, applied the brakes, gave warning to the passengers on the front platform, turned his back to get away from the flying glass and was knocked up against the bulkhead or exit door. This was not denied by any probative evidence. Salenl was in no position to know whether the motorman shut off the power and applied the brakes. The motorman said the tractor faced north and south and skidded across broadside. After the collision the streetcar was not stopped with the controller which had been knocked off. It was stopped by pulling the trolley pole off so there

would be no current to drive the motor. The air lines had been severed so that when the trolley pole was pulled off, there was no way of applying the brakes. That is why the car went about 80 feet to the center of Lowe Avenue before it finally stopped. This was the result of the collision and not the cause of it. We find that the court was right in entering judgment notwithstanding the verdict in favor of the Transit Authority.

Gottlieb asserts that the court erred in refusing to direct a verdict for him and in denying his motion for judgment notwithstanding the verdict. In addition to a general denial of the allegations in plaintiff's complaint, this defendant specifically stated in his answer that at the time and place alleged in the complaint he did not own, operate, manage, drive or control the tractor alleged to have caused the injuries. The tractor was owned by Lester Heaton of Cedar Rapids, Iowa, and at the time of the occurrence was being driven by his brother, Asil Heaton, and was under lease to defendant, whose warehouse was located at 2500 South Normal Avenue, two blocks east and one block south of the place where the collision occurred. Asil Heaton was on defendant's regular payroll. He was paid only by the mile and his payment would start at the time his brother's tractor was hooked on to one of defendant's trailers. The defendant had a social security number for Asil Heaton. Since 1946 he worked regularly and exclusively for defendant. He was not paid for any other time as he was on a mileage basis. This defendant had 65 to 70 trucks

of his own and in addition leased tractors to haul his trailers. All drivers, whether they used defendant's trucks or tractors or drove leased equipment, were paid by the mile. When the defendant's drivers would come into Chicago with loads they would deliver the loads to defendant's warehouse. After drivers arriving from out of town had delivered their loads to the warehouse they would go to their hotel. It was defendant's custom to let the driver have a minimum rest of eight hours between loads. As drivers were needed they would be called and told what loads to pick up. After a driver delivered his load, defendant would not know where the driver went with his tractor. Out of town drivers, including Asil Heaton, stayed either at the Metropole or the New Michigan Hotel in Chicago and were subject to call at any time by defendant.

The gas and oil used in leased tractors were paid for by the owners of the tractors. If an accident occurred, defendant had nothing to do with ordering repairs. If defendant paid a repair bill on a leased tractor, such payment was deducted from the driver's earnings. Defendant was billed for towing Lester Heaton's tractor after the collision on February 8, 1947. Asil Heaton brought in a load to defendant's warehouse on February 7, 1947. The record is silent as to the whereabouts of Asil Heaton between the time of delivering his load on February 7 and the time of his death resulting from the collision between the tractor he was driving and the streetcar on the morning of February 8, 1947; nor is there any evidence that defendant or any of

his representaives communicated with or called Asil Heaton between the time of delivering his last load on February 7, 1947, and the time of his death the following morning. The record is silent as to where he was going at the time of the mishap.

Plaintiff urges that the facts and circumstances in the case raise legal inferences and presumptions that Asil Heaton in operating the tractor was acting within the scope of his employment. He points out that the courts of this state and other jurisdictions hold that proof of ownership of a commercial vehicle raises the presumption and inference that the operator is the agent and servant of the owner and that the operator is acting within the scope of his employment, which can only be rebutted by clear and convincing evidence. The parties are in agreement that the burden of proof was on plaintiff to prove that Asil Heaton was acting in the scope and course of his employment for Gottlieb at the time of the collision, and that the doctrine of respondeat superior is applicable only when there is a relationship of employer and employee and when the employee is acting within the scope and course of his employment. The rule is well stated in 57 C. J. S., Sec. 615, p. 394, (b):

"The burden is on plaintiff to establish the liability of the master by showing, for example, that the relation of master and servant existed at the time of the injury with respect to the particular transaction in question, and that the servant acted within the scope of his employment. The burden is on defendant to rebut a prima facie case."

The only reasonable inference that can be drawn from the record is that the tractor was leased to pull trailers either loaded or empty. It would be conjecture to say that

it was leased to allow Asil Heaton to drive it at Lowe and Archer Avenues on his own time and about no business of the defendant. Asil Heaton was employed only to haul trailers. His compensation began when such activity commenced and ended when the trip was concluded. There is no evidence that Asil Heaton was on his way to the terminal at the time of the occurrence. Assuming, arguendo that he was on his way to defendant's terminal, it has always been the law in this state that when the day's work has ended and the employee has left his master's premises, the relationship of master and servant is suspended. Public Service Company of Northern Illinois v. Industrial Commission, 370 Ill. 334, 335. There are cases such as Heelan v Guggenheim, 210 Ill. App. 1, and Couch v. Central Republic Trust Co., 291 Ill. App. 605, holding the employer liable, but in those cases the accidents occurred within the hours of the servant's contract of employment and the employee was obeying a direction of his employer. Plaintiff claims that there is a presumption that the operator of the vehicle is the agent and servant of the owner and that the operator is acting within the scope of his employment. Our Supreme Court said in Lohr v. Barkmann Cartage Co., 335 Ill. 335, that presumptions are never indulged in where established facts exist; that they supply the place of facts; and that when evidence is produced which is contrary to the presumption, the presumption vanishes entirely. Plaintiff places reliance on the case of Kavale v. Morton Salt Co., 242 Ill. App. 205; 329 Ill. 445. There the mishap occurred during the regular hours of the

servant's employment. The court found he was delivering wood to another employee, which "the jury were warranted in finding was in part for the benefit of the defendant." The cited case is not applicable to the facts of the instant case. In our opinion plaintiff failed to prove that Asil Heaton was the servant of James Gottlieb at the time of the occurrence and with respect to the transaction out of which the injuries arose.

The judgment of the Superior Court of Cook County in favor of Chicago Transit Authority and against plaintiff is affirmed, and the judgment of plaintiff against James Gottlieb, doing business as Western Transportation Company, is reversed, and the cause remanded with directions to enter judgment notwithstanding the verdict in favor of James Gottlieb and against plaintiff.

JUDGMENT AFFIRMED IN PART, REVERSED
IN PART AND CAUSE REMANDED WITH
DIRECTIONS.

FRIEND AND NIEMEYER, JJ., CONCUR.

45632

LEO SLUTZKIN,

Appellee,

v.

VILLAGE OF LINCOLNWOOD, a
Municipal Corporation;

Appellant.

INTERLOCUTORY APPEAL

CIRCUIT COURT

COOK COUNTY.

344 I.A. 553¹

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 1, 1951, Leo Slutzkin filed a complaint in the Circuit Court of Cook County against the Village of Lincolnwood praying for a writ of mandamus commanding defendant and its officers to issue a license for the operation of a hamburger, lunchstand and sea food establishment, to furnish a water supply and to permit advertising display signs on certain premises in the village. Issue was joined and following a trial the court, on July 2, 1951, entered judgment in mandamus directing defendant to do the things sought. On July 6, 1951, defendant filed a notice of appeal. On July 11, 1951, the court entered an order, by authority of Par. 3, Sec. 82 of the Civil Practice Act, that the appeal operate as a supersedeas without defendant being required to give bond.

On July 18, 1951, plaintiff filed a complaint for a temporary and permanent injunction, restraining defendant, its officers and deputies, pending the disposition of the appeal in the mandamus proceeding, from interfering with or preventing him from conducting his business, from serving any summons or arresting him or any of his employees,

or requiring him or them to post bail, from filing or prosecuting any complaints against him or them on account of alleged violations of any ordinances purporting to apply to the conduct of the business, and from prosecuting any pending complaints. On July 19, 1951, the chancellor entered an order for a temporary injunction restraining defendant, its officers, agents and employees, as prayed in the complaint, and on the same day denied defendant's motion to vacate the order. Defendant, appealing, asks that the order granting the injunction be reversed.

A supersedeas suspends the efficacy of a judgment, but does not, like a reversal, annul the judgment. People v. David, 328 Ill. 230, 234. The general rule is that the effect of a supersedeas is to suspend proceedings and preserve the status quo pending the determination of the appeal. C. J. S. 4, Sec. 662, page 1149. Plaintiff maintains that he was operating a "going business" at the time of the issuance of the injunction. The judgment did not authorize him to open and operate his place of business without a license. At the time the mandamus action was filed and at the time judgment was entered therein, plaintiff did not have a license to operate his business. The supersedeas suspended the judgment in mandamus. Plaintiff points out that the object of the supersedeas is "to stay future proceedings and not undo what is already done," citing the David case, in which the court held that during the pendency of the appeal the preservation of the status quo required that the individual concerned should continue

in office. In the instant case the order directing the defendant to issue the license has been suspended pending the determination of the appeal therein. The chancellor erred in enjoining the defendant and its officers from doing what they conceive to be their duty. The effect of the order granting the temporary injunction is to nullify the supersedeas. Under the decisions plaintiff has an adequate remedy at law. Grace Church v. City of Zion, 300 Ill. 513; Rockford Amusement Co. v. Baldwin, 252 Ill. App. 1; Vitagraph Co. v. City of Chicago, 209 Ill. App. 591; People ex rel. Moroney v. Allman, 273 Ill. App. 227.

For the reasons stated the order of the Circuit Court of Cook County of July 19, 1951, granting a temporary injunction is reversed.

ORDER REVERSED.

FRIEND AND NIEMEYER, JJ. CONCUR.

45293

EVAAHLYN STROMSEM,

Appellee,

v.

HAROLD J. STROMSEM,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

34411.353²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This case, which was here consolidated with cause No. 45267, in which an opinion is being concurrently filed, involves payment of attorney's fees to plaintiff for defending her former husband's petition to be relieved of further alimony payments by reason of her remarriage and for defending the appeal in cause No. 45267. The court awarded her two separate fees of \$2500 for these services.

It is urged by defendant that the petition for fees must allege, and the evidence must show, that the wife is without means, as distinguished from "income," to defend the litigation, and that the court has no jurisdiction to make an allowance of attorney's fees or expenses in connection with defendant's appeal because the subject matter does not involve a question of divorce or a matrimonial issue, as contemplated by the statute. These contentions are effectively disposed of in Walters v. Walters, 409 Ill. 298, with the following comment: "Had the defendant complied with the terms of his agreement plaintiff would not be in court. It was his refusal to carry out its provisions which forced her to resort to the courts for relief. In such a situation the

plaintiff should not be without her reasonable attorney's fees, a right accorded to her under the statute, and the referral by the Appellate Court for an order therefor was proper." It should be added that the wife in the Walters case had substantial earnings in her own right, derived from her profession as an interior decorator which made her self-supporting.

However, we agree with defendant's contention that the allowance of \$2500 in each instance, or an aggregate of \$5000, was excessive. No testimony was adduced upon the hearing. The arguments of counsel preceding the orders and judgments from which the appeals were taken were comparatively brief. After an examination of defendant's petition, we have reached the conclusion that \$1000 would be a fair and reasonable allowance. The consolidated appeal, although it involved the same questions, necessitated the writing of briefs, and accordingly we think that \$1500 for services rendered in defending the appeal would be a fair allowance. Consequently the orders of the ~~Superior~~ Court with respect to the allowance of fees are reversed, and judgment is entered here for the respective sums of \$1000 and \$1500, or an aggregate of \$2500.

ORDERS REVERSED,
JUDGMENT HERE.

BURKE, P. J. AND NIEMEYER, J., Concur.

45636

ELEANOR BINDER,

Appellee,

v.

SAMUEL BINDER,

Appellant.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

344 I.A. 554¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

June 13, 1951 Eleanor Binder filed a complaint for separate maintenance in the Superior Court against the defendant Samuel Binder, and had service of summons on the same day. Immediately thereafter, also on June 13, she procured an order for an injunction without notice, and without bond, restraining defendant from "striking, molesting or interfering with plaintiff * * *, from selling, disposing of, destroying, encumbering, transferring or removing the furniture, furnishings and other household and personal belongings and effects * * * located at 577 Woodlawn Avenue, Glencoe, Illinois," property owned by them as joint tenants of the approximate value of \$33,000.00, in which they had resided before the separation. The injunction writ was issued forthwith and served on the defendant on June 13. The following day defendant filed a petition for change of venue, which was granted, and the case was transferred from Judge Desort to Judge Sbarbaro. June 20 defendant filed his answer and counterclaim for divorce. Motion to dissolve the injunction was made and continued to July 16, 1951, and heard by Judge Hoffman, who denied the motion by a written order which found in

part that "to entertain defendant's motion to dissolve the Injunction and vacate order entered on June 13, 1951 by His Honor, Judge Rudolph F. Desort, would be in effect requesting this Court to pass in review upon an order entered by a Judge having like jurisdiction herein."

Defendant has taken an interlocutory appeal from that order; no brief has been filed by plaintiff.

X The principal question presented is whether the injunction was improvidently issued without notice and without bond. Section 3 of the Injunction Act (Ill. Rev. Stat. 1949, ch. 69) expressly provides: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, * * * unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

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109351

The complaint alleges that defendant has threatened to dispose of personal assets belonging to both of the parties; that she fears that unless a writ of injunction be issued enjoining defendant from disposing of them, plaintiff will be irreparably damaged; and that if notice is given "this will cause her irreparable harm and injury; that plaintiff has not sufficient funds wherewith to post bond for the issuance of said Writ of Injunction." Allegations similar to these were held to be insufficient to support the issuance of a writ of injunction without notice and without bond in Peck v. Peck, 213 Ill. App. 665 (Abst.),

and in an unbroken line of more recent decisions, including Grossman v. Grossman, 304 Ill. App. 507, and Brown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430. In Grossman v. Grossman, *supra*, approving the holding in Brin v. Craig, 135 Ill. App. 301, it was said that no presumptions are to be indulged in favor of action without notice, but that the parties must, on facts stated and sworn to, bring themselves within the exceptions of the statute, and that failing to do so, the injunction granted would be held to be improvident and would be dissolved. In Skarpinski v. Veterans of Foreign Wars, 343 Ill. App. 271, a per curiam opinion filed this year, the second division of this court had occasion to consider the propriety or impropriety of issuing an injunction without notice. It was there pointed out that almost every opinion of this court which has had occasion to take notice of this question, has emphasized the need for great caution in the granting of such orders, whether for receivers ~~or~~ for injunction, citing numerous cases.

After a careful examination of the complaint we are convinced that the injunction was improvidently issued. The complaint alleged no facts from which the reasonable conclusion could be drawn that defendant would injure plaintiff or dispose of the household assets if notice of the application for an injunction had been served upon him. The order of the Superior Court should therefore be reversed.

As heretofore stated, Judge Hoffman thought that he lacked authority or jurisdiction to review the order of Judge Desort when defendant moved to dissolve the injunction

with a supporting answer. Under Supreme Court Rule No. 31 and Appellate Court Rule No. 21 (2nd par.) which have been embodied into the statute as chapter 110, section 259.31, when "an interlocutory order or decree is entered on an ex parte application, the party proposing to take an appeal therefrom shall first present, on notice, a motion to vacate the order or decree to the trial court entering such order or decree. Appeal may be taken if the motion is denied, or if the court does not act thereon within seven days after its presentation." Obviously, defendant could not seek a review of the injunction order until and unless he had presented a motion to vacate that order and dissolve the injunction. That was the very purpose for the enactment of the foregoing rules. At the time he presented his motion to vacate, a change of venue had been duly granted from Judge Desort, and of course no motion could be presented to him. If we were to approve Judge Hoffman's refusal to review Judge Desort's order, defendant would be left without the right of appeal. On occasions judges have been reluctant to review orders previously entered in a case by fellow judges, but in this instance the motion to vacate and dissolve the injunction was one that necessarily required one of the judges of the court to determine whether the injunction was improvidently issued without notice and without bond. Defendant was entitled to a ruling on his motion to dissolve the injunction upon the merits, and it was error for the court to refuse such ruling.

For the reasons indicated the order denying defendant's motion to dissolve the injunction is reversed, as is the injunction which we hold to have been improvidently issued.

Orders reversed.

Burke, P.J. and Niemeyer, J. Concur.

45325

BITUMINOUS CASUALTY CORPORATION,
a corporation,

Appellant,

v.

M. M. LANGENDERFER and I. H.
LANGENDERFER, individually and
trading as SOUTHERN EXPRESS and
SOUTHERN EXPRESS COMPANY, a cor-
poration,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

3441A-354²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendants entered on the verdict of the jury in its action for additional premiums on a Workmen's Compensation policy based on a hired teams and hired automobiles endorsement alleged to have been attached to the policy. Defendants claimed that the policy had been lost.

Plaintiff, from records in its files, constructed a specimen policy which was received in evidence. The sole issue of fact was whether or not the above endorsement was a part of the original policy delivered to defendants. There is no direct testimony that it had been endorsed on or attached to the policy at the time of delivery. There is no positive testimony that it was not on the policy when delivered. The instructions of the court are confusing and contradictory. The jury was instructed "that the policies of insurance here in evidence embodied the entire contract between the plaintiff and the defendant." A further instruction directed the jury to find the defendants not guilty if they found that

the endorsement was **not** attached to the policy. At the request of plaintiff a special interrogatory--"Was the hired teams and hired automobiles endorsement attached to the original policy of insurance as delivered to the defendants?"--was submitted to the jury, which answered "No." The verdict for defendants is consistent with this answer. Plaintiff moved for judgment notwithstanding the verdict, or in the alternative for a new trial. In neither motion was an objection made that the answer to the interrogatory was contrary to the weight of **evidence**, although the motions did raise the objection that the verdict was contrary to the evidence. This does not preserve the objection to the answer to the interrogatory, and the finding of the jury is conclusive and controlling. Brinie v. Belden Mfg. Co., 287 Ill. 11; Brant v. Chicago & Alton R. Co., 294 Ill. 606; Rubottom v. Crane Co., 302 Ill. App. 58; Worthen v. Thomson, 343 Ill. App. 62.

The judgment is affirmed.

AFFIRMED.

Burke, P. J., and Friend, J., concur.

45372

BERNARD KULCZYK,

Appellee,

v.

THE BOARD OF FIRE AND POLICE
COMMISSIONERS OF THE CITY OF
CALUMET CITY, ILLINOIS, and
JULIUS HOFFMAN, MAURICE LeNOUE
and BERNARD SKWIRTZ, Members of
said Board,

Appellants.

APPEAL FROM

CITY COURT OF

CALUMET CITY

344 I.A. 555

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in a proceeding under the Administrative Review Act reversing an order of The Board of Fire and Police Commissioners of Calumet City discharging plaintiff as Lieutenant of Police and member of the police department of Calumet City for conduct unbecoming an officer.

On June 9, 1949 Gerald W. Lunney, owner and operator of a gasoline service station at 61st street and Ellis avenue, Chicago, spent the afternoon working on his boat at Andy's Boat Yard, 130th and Torrence avenue; he left the boat yard with his employee Fields; they arrived at the Show Club in Calumet City around 7:30 p.m.; Lunney ordered two bottles of beer, which they drank; Fields then ordered two bottles of beer and invited the barmaid to drink with them; she took whiskey; a discussion arose as to the amount of the bill; plaintiff came in the tavern with police officer Wilhelm and entered into a discussion with Lunney about payment of the bill. There is a direct conflict in the evidence as to what was said and done by the

respective parties, except that plaintiff struck Lunney an unascertained number of blows on the leg with his policeman's club, producing a compound comminuted fracture of the tibia and fibula of the right leg. Lunney and Fields were arrested and taken to the police station. When it was discovered that Lunney's leg was broken he was removed to a hospital in Hammond, Indiana and from there to a hospital in Chicago where he was treated by his physician. ✓

July 5, 1949 Lunney advised the Chairman of the Police Board that he had been assaulted by plaintiff and his companion and believed that the situation warranted investigation and action by the city's Civil Service Commission. After complaint on Lunney's behalf to the State's Attorney, that official advised the Police Board of Lunney's complaint. Thereafter charges were prepared by the Police Board against plaintiff, and after proper notice a hearing was had on November 28, 1949 at which Lunney and Fields testified in support of the charges. Plaintiff was represented by counsel, testified in his own behalf and produced as occurrence witnesses the owner of the Show Club, the barmaid, the owner of a neighboring tavern, the floor man of the Show Club, the floor man of The Rainbow, across the street from the Show Club, and officer Wilhelm. The testimony of Lunney and Fields tends to support Lunney's contention that plaintiff undertook to secure payment of the disputed bill and struck Lunney in furtherance of this undertaking. Testimony on behalf of plaintiff tends to support his claim that Lunney used vile and offensive language in talking to the barmaid; that he

called her a whore and made an improper suggestion to the owner of the neighboring tavern; that when plaintiff attempted to remove Lunney he grabbed hold of the bar, kicking a stool which struck plaintiff and then kicked plaintiff several times in the groin; that plaintiff then struck Lunney, inflicting the injuries noted above and dragged him out of the tavern into the police car in which he was taken with Fields to the police station.

The Police Board expressly found that plaintiff attempted to collect from Lunney the disputed bill for the drinks; that Lunney's conduct did not constitute a breach of the peace or disorderly conduct and that plaintiff's use of force in arresting Lunney was entirely unwarranted and "far exceeded the measure that should have been exercised even if an alleged serious offense was involved"; that it could not accept as true or worthy of any credence or belief the testimony of some of respondent's witnesses that complainant used vulgar language to the barmaid, made an improper proposal to the neighboring tavern owner, called the barmaid a vile name in the presence of plaintiff and was the aggressor in the altercation; that plaintiff grossly abused the power of his office in arresting Lunney without just cause; that the amount of force used was so grossly excessive and brutal that it evidences a wilful disregard of the rights of a citizen and a total lack of any appreciation of plaintiff's obligation and duties as a police officer. The finding of the Board can not be disturbed by the court unless manifestly against the weight of the evidence. Drezner v. Civil Service Commission, 398 Ill. 219; Outboard, Marine & Mfg. Co. v.

Gordon, 403 Ill. 523; Local No. 658 v. Brown Shoe Co., 403 Ill. 484. In the instant case there is no well established or admitted fact or circumstance which tends to support or discredit the testimony of any of the witnesses. The decisive evidence consists of highly conflicting statements of the respective witnesses, none of whom are without bias or interest. Determination of where the preponderance of the evidence lay was preeminently a function of the Police Board. Turner v. Industrial Commission, 393 Ill. 528. The mere number of witnesses called by a party is not controlling. The trial court had nothing but the written record before it and was in no better position than is this court to judge of the credibility of the respective witnesses. The Police Board had the advantage of seeing the witnesses and hearing them testify. Its decision as to where the preponderance lay should not be disturbed.

If plaintiff's testimony that he arrested Lunney when the latter referred to the barmaid as a whore be accepted, plaintiff was making an arrest for disorderly conduct. The force used was excessive and unlawful. Lane v. Butler, 225 Ill. App. 382; City of Marseilles v. Heister, 142 Ill. App. 299. The order of the Police Board is supported by the law and the evidence.

The contention of plaintiff that the regulations of the Police Board limited complaints to citizens of Calumet City is without merit. The statute does not limit complaints to citizens of the village employing the policeman, and rules or regulations of the local police board cannot be construed to so limit the statute.

The judgment is reversed.

REVERSED.

BURKE, P. J., AND FRIEND, J., Concur.

45387

48 A

LODGE SUPREME BLDG. CORP., INC.,
a Corporation,

Appellant,

v.

GEORGE LOVE,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

341 I.A. 556¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant in an action of forcible detainer for failure to pay rent after service of a 5-days notice.

The case was heard before the court without a jury. The indebtedness for the rent claimed is admitted. There was no tender before the expiration of the five days after service of notice, Plaintiff therefore was entitled to possession. Leary v. Pattison, 66 Ill. 203.

Judgment is reversed and the cause remanded with directions to enter judgment for plaintiff.

REVERSED AND REMANDED
WITH DIRECTIONS.

Burke, P. J., and Friend, J., concur.

45400

50 A-

SARAH BRAVERMAN,
Appellant,
v.
NATHAN GOLDMAN,
Appellee,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

34 I.A. 556²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant in her action of forcible detainer for possession of an apartment.

Prior to April 14, 1950 the rent had been paid by personal checks. On that date plaintiff wrote defendant that the rent had not been received and asked that a check be sent by return mail. The check was mailed April 17, 1950. April 18th plaintiff wrote defendant that the check had been received but that in the future all rents were to be paid in cash at plaintiff's office to avoid any misunderstandings. May 2, 1950 defendant advised plaintiff that he would mail her the rent by postal or other money order, and plaintiff wrote that the rent must be paid in currency at plaintiff's office. May 31, 1950 defendant mailed an uncertified check in payment of rent. This was returned to defendant by plaintiff with a letter dated June 1, 1950 stating that the check was being returned because of noncompliance with the demand for payment in cash or currency at the office of plaintiff. Another uncertified check dated June 5, 1950 was returned for noncompliance with the demand for payment

in cash. June 15, 1950 defendant's attorney enclosed a postal money order in his letter sent by registered mail with a request for return receipt. The letter was returned marked "Refused." June 27, 1950 plaintiff served a 5-day notice on the defendant demanding rent for the month of June 1950 in the amount of \$43.12 and stating that unless payment be made within five days the tenancy will be terminated; that "cash money only will be accepted." June 29, 1950 defendant's attorney again mailed a money order. This letter was returned marked "Unclaimed."

The court held that the landlord could have demanded legal tender but that United States Government postal money orders were legal tender. No authority is cited in support of this position and we know of none. Plaintiff having demanded payment in cash, money was the sole medium of payment. Margulus v. Mathes, 339 Ill. App. 497. The attempt to pay by postal money order sent by registered mail did not constitute tender of payment. Davis v. Muriset, 334 Ill. App. 107.

The judgment is reversed and the cause remanded with directions to enter judgment for plaintiff.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, P. J., AND FRIEND, J., Concur.

45428

FLORENCE BERGER,
Appellant,
v.
HILBERT BERGER,
Appellee,

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

344 I.A. 557¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff in a divorce action appeals from an order granting to defendant the custody of the child of the parties for a limited time at stated periods.

The decree was entered February 17, 1947 for the fault of the defendant, and the custody of the child, then ten months of age, was awarded to the plaintiff subject to defendant's right and privilege of seeing and visiting with the child at all reasonable times. Provision was made for payments by defendant for the support of the child. Plaintiff waived alimony. On May 17, 1949 the support money for the child was reduced and defendant's request for overnight custody of the child on alternate weekends was denied. Pursuant to a petition filed June 20, 1950 an order was entered June 23, 1950 modifying the decree to permit the defendant to have the child with him at defendant's mother's home on alternate weekends from Friday at 11 a. m. to Sunday at 1 p. m., and on alternate Fridays from 10 a. m. to 6 p. m. July 18, 1950 plaintiff filed a petition reciting that on Saturday, July 1, 1950, of the first weekend when the child was taken by defendant to the home of his parents, defendant was not at the home

during the entire day; that the child was not visiting with her father but was in the custody and care of the grandparents, and, at approximately 6 o'clock in the evening while playing with her grandfather the child fell to the floor and broke her arm in two places; that it was necessary to put the arm in a plaster cast which the child would be required to wear for a period from 8 to 10 weeks. On the same day, an order was entered vacating the order of June 23, 1950, restoring the total custody of the child to the plaintiff during the period that the child's broken arm would remain in a cast and "until this matter can again be heard by the court as a regular matter in lieu of the emergency court." September 27, 1950 defendant filed a petition reciting that the child had fully recovered from her injury and that the defendant had paid all medical bills; that since the entry of the order, July 18, 1950, plaintiff had refused to permit defendant to see the child or take her to his mother's home and had poisoned the child's mind to such an extent that she refused to talk to defendant and to approach him on the street. Plaintiff answered the petition and on November 16, 1950 the order of July 18, 1950 was vacated and set aside and the order of June 23, 1950 restored until the further order of the court. Plaintiff appeals from the order of November 16, 1950 and from the order of June 23, 1950.

The order of June 23, 1950 recites that it was entered on the motion of defendant, "the court hearing testimony and being fully advised in the premises." There

is no report of proceedings of the hearing before the court and we must assume that the testimony heard supported the order entered. In respect to the order of November 16, 1950, the report of proceedings shows an extended colloquy between the court and counsel; that plaintiff was the only witness called. She was examined by her counsel and cross-examined by counsel for defendant. The injury to the child on July 1st was accidental. There is nothing in the record to show that the home of defendant's mother is not a proper place for the child or that the grandmother and grandfather are not proper persons to care for the child while in defendant's custody for the periods designated in the order. Plaintiff testified that she thinks defendant is a drunkard. Her counsel made statements that defendant was neurotic, unstable--having had about 15 jobs in a period of 3 or 4 years. There is no testimony in the record relating to conduct of defendant subsequent to the order of June 23, 1950. At the close of the hearing plaintiff's counsel suggested that he would like to examine defendant, but there is nothing in the record to indicate what counsel expected to prove. The order of July 18, 1950 suspending the order of June 23, 1950 was evidently entered because of the injury to the child. The child had fully recovered when the order of June 23, 1950 was reinstated. There is nothing in the record to show an abuse of discretion in the reinstatement of this order. Children of divorced parents are in difficult positions, particularly with respect to the parent who has only occasional custody or privilege of visitation. Orders like the one under considera-

tion should be encouraged in order that the child may not be estranged from its parent. If in practice the defendant abuses the privilege or it works to the disadvantage of the child, it can be modified. .

The order is affirmed.

ORDER AFFIRMED.

BURKE, P. J., AND FRIEND, J., Concur.

45498

ESTELLE ELLMAN and PHILIP ELLMAN,
her husband,

Appellants,

v.

GARRETT De RUITER,

Appellee.

APPEAL FROM

COUNTY COURT

COOK COUNTY

34 I.A. 557²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs, husband and wife, appeal from an order in a proceeding under section 72 of the Civil Practice Act vacating and setting aside default judgments for \$2,000 each on their respective claims based on an alleged assault on the wife during a controversy as to the ownership of a mirror in the door of a medicine cabinet in the apartment which plaintiffs were vacating after defendant acquired the building.

In this suit each plaintiff seeks damages of \$2,000 because of the alleged assault. Summons was served on defendant October 31, 1950, 20 days before the first return day--November 20, 1950. Defendant did not appear until December 4, 1950, the second return day. November 24, 1950 he was defaulted and judgments were entered against him in favor of each plaintiff for \$2,000 and costs. January 10, 1951 defendant filed his petition in the nature of a writ of error coram nobis to vacate the respective judgments. Plaintiffs answered. On hearing on the petition, answer and affidavits in support of the position of the respective parties, the judgments were vacated and the executions issued thereon quashed. This appeal followed.

Defendant's petition recites that he was served with the summons October 31, 1950; that he delivered the summons to his attorneys on November 1st; that an assistant docket clerk employed by the attorneys checked the return of the summons and indorsed on the summons:- "Summons filed 10-25-50; served 11-1-50; return 11-20-50, 12-4-50"; that in reliance on this report his attorneys filed his appearance and pleading December 4, 1950; that the failure of defendant to file his appearance on November 20th was not due to negligence but to excusable mistake--reliance of defendant's attorneys on the report of their docket clerk; that when the judgments were entered the presiding judge was not informed that a criminal case based on the alleged assault was pending, or that plaintiff's attorney had furnished a copy of the complaint in the civil case to defendant's attorneys. The petition further recites: within a few days after the alleged assault defendant was arrested on a complaint filed in the Municipal Court of Chicago by the wife; in that proceeding, referred to in the petition as a criminal case, defendant was represented by attorney M. F. Henkel; the case was continued from time to time from October 4th to December 8, 1950, when defendant appeared with his attorney, Henkel, and Robert S. Morris, an attorney employed by defendant's attorneys, in the civil action; plaintiff's attorney, Nathan M. Gomberg, was present; before the case was called Morris suggested a basis for settlement to Gomberg, who replied that he wanted to see how the pending case came out and how severe the injuries were, and would be prepared to talk settlement around



the first of the year; when the case was called Morris stated to the court that his firm represented defendant in the civil action and asked for a continuance in order that the matters in controversy might be adjusted; Gomberg objected upon the ground that the civil action had nothing to do with the case then before the court. He did not inform the court or Morris that default judgments had been entered in the civil action. Neither defendant nor his attorneys learned of the entry of these judgments until January 5, 1951.

A motion under section 72 of the Civil Practice Act is for the correction of such errors of fact only as could have been corrected at common law under a writ of error coram nobis. The office of this writ, as stated in McCord v. Briggs & Turivas, 338 Ill. 158, is "to bring to the attention of the court errors of fact, such as *** a valid defense existing in the facts of the case but which, without negligence on the part of the defendants, was not made, either through duress or fraud or excusable mistake, such facts not appearing on the face of the record, and which, if known by the court, would have prevented the rendition and entry of the judgment." Defendant's failure to enter his appearance on November 20, 1950 was due to the reliance of his attorneys on the erroneous report of their docket clerk as to the date of service of ^{the} summons. No act or omission of plaintiffs contributed to this error. It is not an excusable mistake available as a ground for vacating the default judgment. McCord v. Briggs & Turivas, supra; Cramer v. Illinois Commercial Men's Assn., 260 Ill. 516.

Defendant contends that the failure of plaintiffs' attorney to inform the trial judge who entered the default and judgments that the criminal case based on the alleged assault was pending, and that plaintiffs' attorney had furnished a copy of the complaint in the civil case to defendant's attorneys at their request, constituted fraud; that if the court had been informed of these facts he would in his discretion have required that notice of the hearing for default and judgment ~~XXXX~~ be given defendant. The present case is distinguishable from McKiernan v. Taylor & Lynch Cartage Co., 263 Ill. App. 657 (abst.), relied on by defendant. In that case plaintiff's demurrer to the petition was overruled and the judgment vacated. The facts as shown by the petition, taken as true, are that suit for personal injuries was started October 1, 1930; default was entered November 12, 1930, and the case proven up and judgment entered December 1, 1930; on October 3, 1930 the parties stipulated for examination of plaintiff by a physician who would not afterwards be called as a witness on the trial; numerous conferences were had in October and November for the purpose of arriving at a settlement of the claim; on November 15, 1930 arrangements were made for an interview of plaintiff by defendant's representative and the interview had on November 21st; on December 1, 1930, when the judgment was entered, plaintiff falsely represented to the court that the case had been called on two or three occasions, that defendant had been notified several times and did not seem to care to defend; that during December defendant's repre-

sentative made numerous attempts to communicate with plaintiff's attorney but was always told that the attorney was not in; that neither defendant nor its representative was informed of the taking of the default or proving up of the judgment until after the December term had gone by. The court held that the

"defendant was lulled into a sense of security by the action of counsel for the plaintiff in conducting and carrying on negotiations for a settlement when, at the same time, he was secretly procuring a default judgment and having damages assessed unbeknown to the defendant or its representative. If, as a matter of fact and as charged in the written motion, counsel for the plaintiff stated to the court that the defendant had been notified several times that the case had been called and did not pay any attention, and this was untrue as charged, then plaintiff by his counsel was guilty of a direct misrepresentation to the court."

In the instant case there was no attempt to settle until several weeks after the entry of the default judgments. No direct representations were made to the court. The sole complaint of defendant is failure of plaintiffs' attorney to advise the court of the pendency of the criminal case and that defendant's attorneys had requested and obtained a copy of the complaint from plaintiffs' attorney. The pendency of the criminal case was a collateral matter, having no bearing whatever on defendant's defense, if any, to the civil action. Whatever inferences arose from the procurement of a copy of the complaint from plaintiffs' counsel were rebutted and overcome by the failure of counsel to enter defendant's appearance on the return day. Neither fact--the pendency of the criminal case nor the procuring of a copy of the



complaint--is a fact knowledge of which would have precluded or prevented the entry of the default or judgments. Only such facts are available on defendant's petition. Failure of a plaintiff to inform the court of a defense to the action is not a fraud for which a writ of error ~~coram~~ nobis will lie. Chapman v. North American Ins. Co., 292 Ill. 179; Gustafson v. Lundquist, 334 Ill. App. 287. It necessarily follows that the failure to disclose such collateral and incidental facts as are here complained of cannot be availed of in a proceeding of this character.

However lacking in fairness the conduct of plaintiffs' counsel in the Municipal court on December 8, 1950 may have been, such conduct is not ground for vacating the judgments on defendant's petition. The statutory motion substituted for the writ of error coram nobis can only bring before the court rendering the judgment "matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition." Jacobson v. Ashkinaze, 337 Ill. 141. Matters arising subsequent to the rendition of the judgment cannot be urged. Plaintiffs' counsel wilfully concealed the entry of the default judgments until after the court lost the power to vacate them. This conduct cannot be condoned, but it is not ground for vacating the judgments. Defendant's petition is not addressed to the equitable powers of the court. Loew v. Krauspe, 320 Ill. 244.

The order appealed from is reversed.

ORDER REVERSED.

BURKE, P. J., AND FRIEND, J., Concur.

45507

VINCENT L. KNAUS,
Appellant,

v.

OSMER L. WATERMAN,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

344 I.A. 558¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in his joint action for forcible detainer and rent of an apartment and garage in Chicago.

The judgment order recites that the cause came on to be heard upon the amended statement of claim of plaintiff and "upon the defense and answers to interrogatories by defendant herein and upon the evidence submitted herein and exhibits by plaintiff admitted in evidence which are hereinafter numbered plaintiff's exhibits 1 to 8, inclusive, (which exhibits are attached hereto and made a part hereof and referred to in this order)." Plaintiff's brief states that plaintiff was the only witness. There is no report of proceedings. The exhibits are described in the order as, letters to defendant, landlord's petition for adjustment of rent, order adjusting maximum rent issued by Area Rent Director, landlord's five days notice, notice to defendant to pay amounts due in cash, notice of termination of tenancy, and recites that these exhibits were served as provided by the laws of Illinois and the Federal Rent Control Act of 1949. From these exhibits it appears that defendant was a month to month tenant paying \$58.60 per month; that on June 29, 1950 the landlord petitioned for adjustment of rent

and that on August 3, 1950 an order effective July 5, 1950 was entered by the Area Rent Director changing the rent from \$58.60 to "\$67.50 per month---no decorating or garbage disposal; or \$72.00 per month with decorating and garbage disposal and including increased costs"; that the landlord returned to defendant checks for \$58.60 covering rent for the months of June, July, August, September and October, and, under date of October 4, 1950 advised defendant that "Suit is being filed to have you comply with the amount of \$72.00 per month as ordered by the Office of Housing Expediter"; that under date of September 30, 1950 the landlord notified defendant that thereafter rent payments should be made in cash, that his tenancy of the premises involved herein would terminate on October 31, 1950, and demanded possession on that day. The latter notice referred to the order adjusting maximum rent, above referred to, and stated that defendant had failed to make payments in accordance with the order, and "the sum of \$72.00 per month is now due and payable November 1, 1950 and every month thereafter should you desire to continue in possession of said premises." The five days' notice was dated and served October 7, 1950.

In the absence of a report of proceedings we must conclude that the evidence before the trial court supported the judgment. The order adjusting rent fixed the maximum rent in the alternative, depending on the service furnished the tenant. There is nothing in the record to indicate the rent demanded under the adjustment order prior to the notice

of September 30th. The burden is upon the plaintiff to establish his claim by a preponderance of the evidence. This cannot be left to speculation or surmise.

The judgment is affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., Concur.

45511

JOHN K. KOLAR,
Appellee,
v.
LLOYD R. LIGHTFOOT,
Appellant.

} PETITION FOR LEAVE TO APPEAL
FROM ORDER OF COUNTY COURT
OF COOK COUNTY GRANTING
NEW TRIAL.
}

344 I.A. 558²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Leave was granted to appeal from an order granting plaintiff a new trial after a verdict for defendant in plaintiff's action for damages resulting from a collision between plaintiff's house trailer and the truck driven by defendant on Skokie highway near Wilmette. Plaintiff has not followed the appeal.

The evidence is conflicting and the determination of the case rests solely on a question of fact. The granting of a new trial is largely within the discretion of the trial court, and greater latitude is allowed where a new trial is granted. Loucks v. Pierce, 341 Ill. App. 253; Carter v. Geeseman, 303 Ill. App. 280. Since we feel that the trial court did not abuse the discretion vested in him and the case may be tried again, we do not detail the evidence.

The order appealed from is affirmed.

ORDER AFFIRMED.

Burke, P. J., and Friend, J. concur.

45403

LOUIS E. SKOLNIK,
Appellant,

v.

SUSCO PRODUCTION, a corporation,
MANFORD C. SUSMAN and E. M.
ROBINSON,
Defendants.

E. M. ROBINSON,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

344 I.A. 339

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating a judgment by confession. This order was not "final," within the meaning of Sec. 77 of the Civil Practice Act and the appeal must be dismissed. See Dean v. Gerlach, 34 Ill. App. 233, Aetna Plywood & Veneer Co. v. Robineau, 336 Ill. App. 339; Cramer v. Commercial Men's Association, 260 Ill. 516, 519; and Mast Buggy Co. v. Litchfield Implement Co., 55 Ill. App. 98. The case is pending, no final judgment having been entered. The appellant filed a general appearance and the court is in a position to determine any issues that may be joined. The appeal is dismissed.

APPEAL DISMISSED.

Friend, J., and Niemeyer, J., Concur.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER, A.D. 1950

General No. 9742

Agenda No. 21

Roy M. Stice, et al.,
Plaintiffs-Appellants,
vs.
William C. Nevin, et al.,
Defendants-Appellees.

344 I.A. 642

Appeal from the
Circuit Court of
Sangamon County

Per curiam:

Subsequent to the filing of the Court's opinion in this case, petition for rehearing was granted. The opinion of the Court as modified upon such rehearing is as follows:

Byron B. Stice, as administrator of the estate of Dorothy S. Nevin, deceased, and the other heirs-at-law of Dorothy S. Nevin, deceased, filed their complaint in the Circuit Court of Sangamon County for the construction of the will of John B. Nevin, deceased, and to determine the validity and effect of an amendment to a certain trust agreement made by the deceased during his lifetime.

The defendants were the heirs-at-law of John B. Nevin and the executor under his will, and the trustee under a certain trust agreement dated May 22, 1946.

The complaint alleged in substance that on May 22, 1946, John B. Nevin executed a certain trust agreement with the defendant, First National Bank of Springfield as trustee, and conveyed to the bank certain real estate referred to as the Sangamon County farm and the Morgan County farm. The trust agreement was joined in by

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STATE OF ILLINOIS

THIRD JUDICIAL

APPELLATE COURT

OF CHIEF JUSTICE

General No. 242

General No. 242

appeal from the	Plaintiffs-Appellants,	Roy M. Stice, et al.,
Circuit Court of		
Sangamon County,		
	Defendants-Appellees.	William C. Nevin, et al.,
		vs.

Per curiam;

Subsequent to the filing of the Court's opinion in this case, petition for rehearing was granted. The opinion of the Court as modified upon such rehearing is as follows:

Byron B. Stice, as administrator of the estate of Dorothy S. Nevin, deceased, and the other heirs-at-law of Dorothy S. Nevin, deceased, filed their complaint in the Circuit Court of Sangamon County for the construction of the will of John B. Nevin, deceased, and to determine the validity and effect of an amendment to a certain trust agreement made by and deceased during his lifetime. The defendants were the heirs-at-law of John B. Nevin and the executor under his will, and the trustees under a certain trust agreement dated May 22, 1940.

The complaint alleged in substance that on May 22, 1940, John B. Nevin executed a certain trust agreement with the defendant First National Bank of Springfield as trustee, and conveyed to the bank certain real estate referred to as the Sangamon County farm and the Morgan County farm. The trust agreement was joined in by

Dorothy S. Nevin, who signed the same for the purpose of evidencing her consent and agreement to the trust created. She also signed the deeds conveying the farms to the trustee.

In Paragraph Number 6 of the trust, the settlor reserved the right to revoke the agreement in whole or in part, or to alter or amend the same. Under the terms of the original trust at the death of the settlor, the Sangamon County farm was to be sold and the proceeds of the sale were to be divided one-third to the settlor's wife, Dorothy S. Nevin, and one-third to each of the settlor's two sons by a previous marriage, the defendants John D. Nevin and William C. Nevin. After the death of the settlor, the net income from the Morgan County farm was to be paid one-half to Dorothy S. Nevin, one-quarter to John D. Nevin and one-quarter to William C. Nevin. At the death of Dorothy S. Nevin, the trustee was to sell the Morgan County farm and divide the proceeds equally between John D. Nevin and William C. Nevin.

On August 30, 1946, pursuant to the power contained in the original trust agreement, John B. Nevin executed an amendment to the trust agreement and cut down the interest of Dorothy S. Nevin from a one-third interest in fee in the Sangamon County farm to a life income in one third of the proceeds of the sale of the Sangamon County farm.

The complaint alleged that this amendment was made without the knowledge of said Dorothy S. Nevin and she never at any time agreed to any change in her rights as set forth in the original trust agreement.

On October 27, 1947, John B. Nevin and Dorothy S. Nevin executed a warranty deed conveying an additional ten acre farm to the trust. The complaint alleged that Dorothy S. Nevin joined in the conveyance in the belief that the same would be held under

the original trust agreement and that although it was the duty of her husband, the said John B. Nevin, to inform her of any changes made in said trust instrument which would affect her right or interest therein, he failed and neglected to do so, and the making of the purported amendment to the trust, and the execution and delivery of the conveyance of the ten acre farm constituted a fraud on the said Dorothy S. Nevin and an attempt to deprive her of her marital rights under the statutes of the State of Illinois without her consent.

That on August 30, 1946, John B. Nevin executed a will in which he made no provision for his wife other than a general residuary clause directing that his estate be paid to the said trustee to be held under the terms of said trust agreement as amended. He died August 19, 1948.

His surviving widow, Dorothy S. Nevin, died intestate March 9, 1949.

The defendants filed a motion to dismiss the complaint, which was granted and the cause was dismissed for want of equity.

Plaintiffs appeal from said order.

Plaintiffs complain because the trial court failed to set forth the reasons why it granted the motion to dismiss, and state that a dismissal of a suit for want of equity is not an adjudication of the issues unless the decision was necessarily based upon the merits of the controversy.

(1) There is no necessity for the trial court to state the reasons for granting the motion. The Court found that plaintiffs had not pleaded sufficient facts to constitute a cause of action.

Plaintiff's main contentions are that the amendment to the trust is a fraud on the wife in attempting to deprive her of her marital rights, and that the execution of the deed conveying the

ten acre tract to the trust at a time when her rights had been changed under the trust without her knowledge, constituted a fraud on her.

Dorothy S. Nevin signed and acknowledged the original trust agreement before a Notary Public. The original trust agreement included an express reservation that the settlor had the right to revoke, alter or amend the trust agreement in whole or in part. There was no allegation that Dorothy S. Nevin could not read, or that there was any concealment or misrepresentation of the contents of the trust agreement. Therefore, when she signed the trust agreement she must have known that the settlor had the right to change the interests set forth thereunder.

(2) It is true that if a husband creates a device which enables him to use and enjoy his property during his lifetime, and at the same time deprive his wife of her property rights at his death, or if the gift is made with a fraudulent intent, then it is a fraud on the wife's rights and is consequently void. The trust agreement entered into was the usual and ordinary type of trust agreement, and there was nothing to indicate that it was a fraudulent device to deprive his wife of her marital rights.

(3) The effect of the amendment was to prefer his children over his wife and his stepchildren. The desire to leave property to one's children is not evidence of a fraudulent intent to deprive one's wife of her marital rights. Most of the cases cited by plaintiff are entirely different factual situations and involve legal questions that are not applicable here. However, Smith v. Northern Trust Co., 322 Ill., App., 158 does bear some similarity. We believe it is not controlling, however, because since it involved a conveyance of personal property, the wife did not join or acknowledge the original trust agreement as she

did not join or acknowledge the original trust agreement as she since it involved a conveyance of personal property, the wife

stipulated. We believe it is not controlling, however, because Smith v. Northern Trust Co., 325 Ill. App. 158 does not concern

legal questions that are not applicable here. However, by plaintiff are entirely different factual situations and in-

give one's wife of her marital rights. That is the case, I feel to one's children is not evidence of a husband's intent to

over his wife and his responsibility. The desire to provide security

(2) The effect of the amendment was to protect his children was a trust device to be used in the event of his death.

of trust agreement, and that is the effect of the amendment.

The trust agreement entered into by the parties was a valid and

it is a trust on the wife's life and is enforceable.

his death, or if she dies before him, the trust is to be paid to

and at the same time during his life, the trust is to be paid to

enables him to use and enjoy the income of the trust during his

(1) It is true that the trust was created by a will and that

right to them and the income therefrom was to be paid to the

trust agreement and that the income therefrom was to be paid to the

cents of the trust agreement, the income therefrom was to be paid to the

There was a provision in the trust agreement that the income therefrom

revoked, either in whole or in part, the trust agreement was to be

included an express reservation of the right to amend or revoke the

agreement before a Notary Public, and that the trust agreement was

did in the instant case. There is no evidence that the wife even knew of the existence of the trust in the Smith case, while here she signed and acknowledged the trust agreement and the deeds conveying the property.

Furthermore, the Court pointed out in that case that the widow was given nothing, and was left impoverished without enough money in the estate for even a widow's award, and the reason for the ruling announced in the Smith case, was to give the widow something to live on.

In the present case, the widow did retain a life interest in the property, and did have something to live on, and the reason behind the ruling in the Smith case is not applicable here.

Upon rehearing, the subject of the conveyance of the ten acre tract is further discussed. The only interest which Dorothy S. Nevin had in this real estate was her statutory marital right. This distinguishes the conveyance from the effect it would have had, had she and her husband held such tract as joint tenants. If, as plaintiffs contend, the joinder of the said Dorothy S. Nevin in such deed of conveyance was procured by fraud, such deed would be voidable only with respect to the dower right of Mrs. Nevin, which right was extinguished by her death on March 9, 1949, before any renunciation of the will and without her perfecting her right of dower as provided in Chapter 3, Paragraph 168 to 172 of the Illinois Revised Statutes, 1949. Hence the plaintiffs have no right or interest in such tract nor any right to attack the validity of such deed. The judgment of the Circuit Court is therefore affirmed.

Affirmed.

Abstract

2393
A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1951

344 I.A. 643¹

General No. 9777

Agenda No. 8

T. & R. SUPPLY COMPANY, INC.,)	
Plaintiff-Appellee,)	
vs.	)	Appeal from Circuit
	)	Court of Coles
RUSSELL ZELLERS,	)	County
Defendant-Appellant.)	

O'Connor, P.J.

On April 22, 1950, the plaintiff-appellee, hereinafter called the plaintiff, caused a judgment by confession for \$1915.30 to be entered in the Circuit Court of Coles County, Illinois, in its favor and against the defendant-appellant, hereinafter called the defendant, on a promissory note made by the defendant.

The complaint was one at law on a promissory note signed by the defendant, Russell Zellers. The note is set forth in full in the complaint which recites the date June 15, 1949, at Mattoon, Illinois, and that the defendant promises to pay \$2,394.00 to the plaintiff, T. & R. Supply Co., Inc.. The note provides that the defendant authorizes any attorney of any court of record to appear for him in said court in term time at any time after the execution of the note and confess judgment in favor of the holder of the note for the unpaid balance. The note also contains authorization for inclusion of said judgment, of costs, and 10% of the unpaid balance as attorneys fees, and other provisions common to judgment notes, including an agreement that no appeal shall be prosecuted.

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CONFIDENTIAL
U.S. GOVERNMENT
OFFICE OF THE ATTORNEY GENERAL

Washington, D.C. 20530

General (S. 100)

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

RE:

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

CONFIDENTIAL

On April 22, 1964, the following was received from the
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The note recites that the payment of \$2,394.00 "is the purchase price of the hereinafter described articles." Immediately following the note on the same face thereof, is a list of equipment described as McCorty and Dayton equipment. Thereafter appears an acknowledgment of delivery of the equipment, and after other recitations is the provision that no other agreement, oral or written, express or implied, shall limit or qualify the terms of the instrument. At the bottom on the right hand side appears the signature of the defendant Russell Zellers. Directly opposite, on the left hand side appears "Accepted 6/18/49 T. & R. Supply Co., Inc. by J. C. Stupka." Appearing on the left hand margin are the words "Cancel by order of Feb. 24, 1949."

The complaint alleges that at the time of its filing, on April 22, 1950, \$1915.30 is still due and owing, and that the plaintiff is the owner and holder of the note. Attached to the complaint is the affidavit of J. C. Stupka, President of the plaintiff corporation, who assures that the signature to the right and warrant of attorney is the genuine signature of the defendant who is living, and that there is due and owing \$1732.00 principal, plus \$10.10 interest, plus \$173.20 attorneys fees, after allowing all credits and set-offs, and that if sworn as a witness he could testify to those facts and would be a competent witness to so testify.

Immediately following the affidavit and on the same page appears a cognovit wherein the defendant, by his attorney, comes and defends, waiving issuance of service of process and admits the allegations of the complaint and confesses the debt and agrees that judgment may be entered against him for \$1915.30 and costs, and agrees that no appeal shall be prosecuted on the judgment, releasing all errors and consents to immediate

execution on the judgment. The complaint, affidavit and cognovit were all filed on April 22, 1950 and judgment was entered by confession on that day in favor of the plaintiff and against the defendant for the sum of \$1915.30 and costs. Execution was issued on April 25, 1950 against the defendant.

On May 24, 1950 defendant filed a motion to vacate said judgment. The motion alleges that the whole transaction between the plaintiff and defendant originated on February 24, 1949, as evidenced by an order for equipment and promissory note for the purchase price thereof, which was attached to the motion and marked "Exhibit 1." Also attached to the motion and marked "Exhibit 2" is an instrument which purports to be the original with a stamp mark "Paid" across the face thereof, and alleges that judgment was not confessed on either "Exhibit 1" or "Exhibit 2".

The motion further alleges that an agreement was entered into by the plaintiff and defendant on June 15, 1949 as appears from "Exhibit 3" which is attached to the motion. Exhibits numbers 1 and 2 are photostats. Exhibit No. 3 consists of two pages marked pages 2 and 3 and appears to be a typewritten copy of the note incorporated in the original complaint. The motion further alleges that Exhibit No. 3 and a duplicate thereof, is the only agreement which the defendant signed on June 15, 1949. The motion is signed by the defendant and in the left hand corner thereof it is recited "subscribed and sworn to before me, a Notary Public, in and for Coles County, Illinois this 22nd day of May, 1951. (Signed) John C. Petteys, Notary Public."

At the end of page 3 of Exhibit No. 3 is what purports to be a certificate of correctness signed by the defendant, but not sworn to.

Plaintiff, on November 8, 1950, filed a motion to strike the motion to vacate the judgment, alleging that the motion to vacate was

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substantially insufficient at law, alleged no meritorious defense on its face; that it failed to comply with the Supreme Court rules Number 26 and Number 15, and other grounds. Together with said motion was filed a counter affidavit of J. H. Anderson, one of the attorneys associated with the firm of Craig and Craig, attorneys for plaintiff, in which it is sworn that the motion to vacate judgment was not filed until 32 days after the judgment was entered, and further, that the equipment which the defendant received from the plaintiff had been sold to a third party; that he is therefore barred from alleging any meritorious defense, even if he should have one.

On a hearing, the motion to strike the motion to vacate the judgment was allowed and leave was granted defendant to file an amended motion. On November 16, 1950, the defendant filed "Motion to Strike Order." The motion claimed that the affidavit of J. C. Stupka, President of the plaintiff corporation, that the defendant owed plaintiff \$1915.30, is "malicious, false and fraudulent" because defendant claims there is no money now due. This motion is sworn to by John G. Petteys, who swears that he was familiar with each and every statement of facts set forth in the motion, and knows of his own knowledge that they were true in substance and in fact.

On hearing by the court of the defendant's motion to strike order of court previously entered, the motion was denied.

Notice of appeal was filed by the defendant stating that the order dismissing motion to vacate judgment should be reversed; that is the relief sought, and the case comes to this court on that point.

The record is clear that the judgment by confession was entered in open court and was properly entered of record and was not entered by the clerk in vacation, so that any point made by the defendant as to the judgment being entered by the clerk in vacation is not well taken.

The only question here for decision is the sufficiency of the affidavit or affidavits in support of the motion to vacate made on behalf of the defendant.

The rules of the Supreme Court, numbers 26 and 15, provide the method by which a judgment by confession may be opened.

Rule 26 of the Supreme Court provides as follows:

"A motion to open a judgment by confession shall be supported by affidavit in the manner provided by rule 15 ^{***} and if the motion and affidavit disclose a prima facie defense on the merits ^{***} [^] the Court shall set such motion down for hearing."

Said rule also provides:

"If, at the hearing upon such motion, it shall appear that the defendant has a defense on the merits ^{***} [^] that he has been diligent in presenting ^{his} ~~said~~ motion to open such judgment, the Court shall then sustain ^{the} ~~said~~ motion ^{***} [^] and the case shall ^{Thereafter} proceed to trial, ^{***} [^]."

Rule 15 of the Supreme Court provides as follows:

"Affidavits in support of and in opposition to a motion by plaintiff or defendant for summary judgment or decree shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counter-claim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the party relies; shall not consist of conclusions, but of such facts as would be admissible in evidence; and shall affirmatively show ^{that} [^] the affiant, if sworn as a witness, ^{testify} can ~~competently swear~~ thereto. - "

A careful reading of the record shows that the motion to vacate, together with the motion to strike order, both filed by the defendant and

both being sworn to, are the only affidavits filed in support of the motion to vacate and that they do not comply with the Supreme Court Rule 15.

The motion does not deny that the note upon which judgment was confessed was signed by the defendant; does not deny that the equipment for which the note was given was received by the defendant, and does not deny that the defendant owes the amount of money for which the judgment was entered. The motion on the other hand, states that the "contract on which the judgment was entered is not the contract entered into by the parties." The judgment was not entered on a contract but rather on a note. To say that the parties did not "enter into a contract" is a conclusion. The entire motion or motions which we are considering as affidavits, are but general allegations and conclusions and not sufficient under Rule 15 of the Supreme Court to allow the vacation or opening of a judgment entered by confession.

The law is well settled that an affidavit in support of a motion to vacate a judgment entered by confession must state facts which constitute a meritorious defense and on which motion the affidavit is to be construed strictly against the party presenting it. Mandel Bros., Inc. v. Cohen, 248 Ill. App. 188. An affidavit in support of such a motion must set forth the facts relied upon with particularity, and shall not consist of conclusions, but of such facts as would be admissible in evidence, and it must appear affirmatively from such affidavit that if the affiant were sworn as a witness he could testify competently thereto. Kirchner v. Boris and Dave Goldenherah, et al., 315 Ill. App. 305.

The affidavits filed in this case do not in any way conform to the well settled rule.

In view of the foregoing any other points raised by the defendant in his brief and argument will not be considered.

The judgment of the Circuit Court of Coles County is affirmed.

Affirmed.

1. The first part of the report is a general
introduction to the subject of the study.
The second part is a description of the
method used in the study.

2423

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Abstract

October Term, A. D. 1951.

General No. 9776

Agenda No. 7.

BARNEY GAVENDA,
Plaintiff-Appellee,

Vs.

FREDMAN FURNITURE COMPANY,
INCORPORATED, AN ILLINOIS
CORPORATION,
Defendant-Appellant.

Appeal from Circuit
Court of Fulton County.

3441.A. 343²

Reynolds, J.

This is an appeal from a declaratory judgment or decree of the Circuit Court of Fulton County in favor of plaintiff-appellee, Barney Gavenda, after a trial by the Circuit Court without a jury.

The court construed the terms of the lease of a store building. The question at issue was who was obligated under the lease to make exterior repairs. The plaintiff filed the suit after a difference in the construction of the lease had arisen and the defendant had withheld from the rents, the sum of \$800.00 which the defendant had spent on the exterior of the building.

The defendant contended that the sixth clause of said lease, which reads as follows:

"And the said party of the second part hereby covenants that, at the expiration of the time in this lease mentioned, or that, as soon as determination thereof by forfeiture or otherwise, the said party of the second part shall yield up the same to the party of the first part in as good a condition as when the same were entered upon by the said party of the second part, loss by fire, inevitable accident and ordinary wear excepted, and that the said party of the second part will keep said premises in good repair during this lease at its own expense."

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SECRET

General No. 100

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and the last clause of said lease which reads as follows:

"It is further mutually agreed by and between the parties that the party of the second part knows the condition of said building; that party of the second part agrees to remodel said building in accordance with plans and specifications to be agreed upon by the parties to this contract, said cost of remodeling to be in an amount of approximately \$20,000.00; that party of the second part will keep the interior of said premises in good repair and at its own expense, doing any and all interior decorations and repairs on the interior and said cost of remodeling and said interior decorations and interior repairs, said party of the second part shall do at its own expense."

created an ambiguity in said lease in so far as it pertained to exterior repairs.

It was the contention of the plaintiff that the two said clauses were not ambiguous but the plain intent of the parties that the defendant was to "keep the entire premises, interior and exterior in good repair during the term of the lease."

Upon the trial of the cause, the following stipulation was entered into:

"It is stipulated by and between the parties hereto, the plaintiff, Barney Gavenda, being represented by Chiperfield & Chiperfield, and the defendant, Fredman Furniture Company, Incorporated, an Illinois Corporation, being represented by Cassidy, Sloan & Crutcher, as follows:"

"That on the 4th day of November, 1946, a lease was entered into by and between Barney Gavenda as lessor and Fredman Furniture Company, Incorporated, an Illinois corporation, as lessee, covering and relating to the following described real estate: All of the building now situated in the east one-quarter of lot forty-three in Nathan Jones

addition to Canton with a frontage of forty-one feet east and west and running eighty feet north and south, situated in the City of Canton, Fulton County, Illinois; that said lease provided for a certain term and for a certain rental as appears in said lease being signed by Barney Gavenda, party of the first part, and by Fredman Brothers Furniture Company, Harry Fredman and Neil C. Fredman, secretary; that after the execution of the lease the lessees went into possession of the real estate described in said lease and have remained in possession of the premises from the date of the execution of the lease to the present time, and that the said lease is now in full force and effect."

"And it is further stipulated and agreed that the complaint filed herein contained a true and correct copy of the lease."

"It is further stipulated and agreed that prior to the execution of the lease that a conference or conferences was held between the parties and their respective attorneys; that prior to the execution of the lease under consideration in this case a tentative lease was drawn by the attorneys representing the plaintiff; that this lease was submitted to the defendants and their attorneys at which time certain changes were made in the tentative lease as presented, namely, that the term of the lease was changed from a period of five years to a period of twenty-five years, and a change was made in the amount of rent due under the preliminary lease; that in addition there is incorporated in the lease as finally signed an additional paragraph referring only to fire insurance; and it is further stipulated and agreed that in the lease as finally signed the same provisions are contained relative to the question of repairs

as were contained in the original tentative lease submitted to the defendant."

"It is stipulated that after the draft of the lease was submitted by plaintiff that a fire clause referred to by plaintiff's attorney was drafted by attorneys for the defendants, and that a copy of the lease was made for each party, that the copy which the defendants now have signed by Barney Gavenda contains two sheets, being the first two sheets, which were the same sheets that were originally submitted by him, and that the last two sheets were retyped by a stenographer in the office of attorneys for the defendants, and that they are the same in all respects as the last two sheets contained in the draft submitted with the exception that the fire clause was added; that the other copy which was signed by Fredman Brothers and which is here in court produced by plaintiff is the same in all respects as the copy which defendants have here, but the typing of the first two pages was done in the office of attorneys for defendant and is on paper coming from that office."

After the introduction of the stipulation and the lease, the plaintiff rested his case.

The defendant corporation introduced evidence to show that there had been conversations between the parties prior and subsequent to the execution of the lease, to the effect that the plaintiff was to keep the exterior of the building in repair and the defendant, the interior. These conversations between the parties were denied by the plaintiff and his son, who was claimed to be present at some of the conversations. The defendant introduced evidence to show that the plaintiff and his son had made some minor repairs to the exterior of the building after the lease was executed, the plaintiff claiming that an adjoining property owner complained that water was damaging

his property on account of a down-spout or defect in a gutter, and that he had this repaired for the convenience of the adjoining property owner; that a coal chute was repaired on the side walk on account of the fact that he did not carry public liability insurance and was afraid someone would get hurt.

In the execution of the lease, both parties were represented by attorneys. The lease was drawn after a conference between the parties and their attorneys, by one of the attorneys who submitted it to the other party and his attorney. It was changed by agreement of the parties and then part of it was typed by the other attorney in his office.

This court is unable to agree with the defendant that the rule that a written instrument is to be construed most strongly against the party who was the author of the instrument, applies in this case. The trial court heard the witnesses, the testimony was conflicting and we do not feel justified in reversing the decree of the trial court under the circumstances, but on the otherhand, feel that the result reached by the trial court was correct and should be affirmed.

The judgment of the Circuit Court of Fulton County will therefore be affirmed.

Affirmed.

~~Not to be published in full.~~

105-10300-1000 30 JAN 1965

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John S. ...

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1951

3441.A. 844

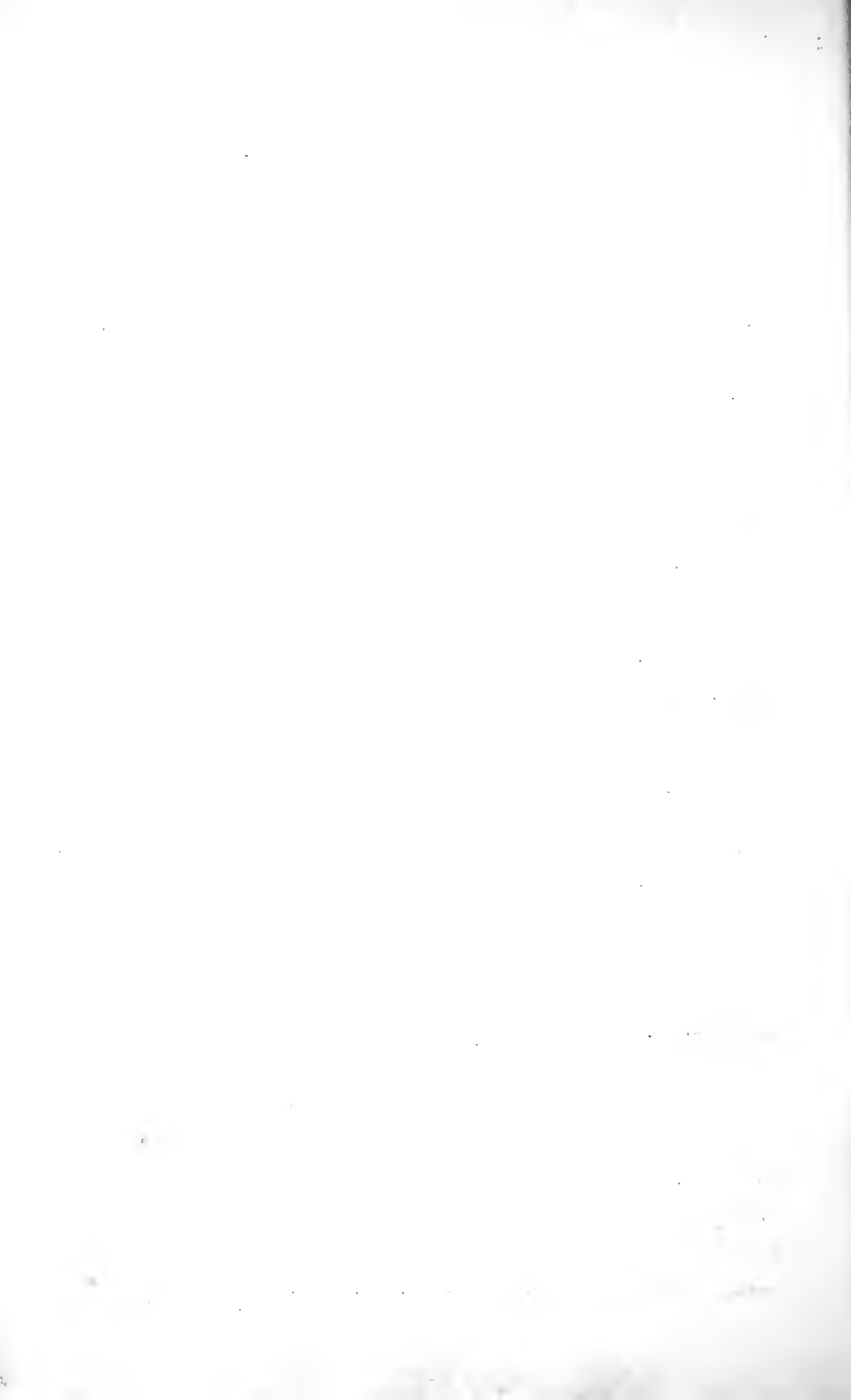
No. 10526
PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,
vs.
JAMES J. BALLAS,
Defendant in Error.

No. 10527
PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,
vs.
FRANK NICOLLETTI,
Defendant in Error.)

CONSOLIDATED
Writs of Error to
the County Court
of Carroll County.

ANDERSON --- J.

The State's Attorney of Carroll County filed two informations in separate suits and by separate counts against James J. Ballas and Frank Nicolletti charging them with various violations of the Illinois Liquor Control Act, wherein it was alleged that they unlawfully and willfully obstructed the view into the interior of their respective taverns, and they failed to have their tavern premises properly lighted, thereby violating paragraphs 141 and 133 of chapter 43, Ill. Rev. Stats., commonly known as



the Iram Shop Act. The provisions of the Statute in question will be discussed later.

The defendants in error, hereinafter referred to as the defendants, filed in the two suits identical motions to quash the informations. The trial court quashed the informations, and the People have sued out writs of error to review the order of the trial court under the provisions of the Statute, Ill. Rev. Stat., 1949, chap. 33, par. 747. Since the issues involved in both of the cases are identical, on motion of the defendants and without objection by the people, the two cases have been consolidated in this court. The informations charge that the defendants own and operate certain duly licensed taverns wherein intoxicating liquors are sold, in Savannah, Illinois; that the defendants unlawfully and willfully obstructed the view into the taverns and failed to have the interior of the taverns properly lighted, contrary to the Statute above mentioned. The information in each case consists of six counts. The sole question presented here as admitted by the parties is whether or not the informations charging the defendants with willful obstruction of the view into their premises and unlawful failure to provide proper lighting therein constitutes an offense for which the defendants upon conviction may be fined. To determine this question it is necessary to construe the pertinent provisions of the Statute, namely: Ill. rev. Stat., 1949, chap. 43, pars. 141 and 183.

Paragraph 141 of the above statute reads as follows:

"141. Unobstructed view of licensed premises. In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first, or ground floor) no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such



licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licenses premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road, or sidewalk. All rooms where liquor is sold for consumption upon the premises shall be continuously lighted during business hours by natural light or artificial white light so that all parts of the interior of the premises shall be clearly visible. In case the view into any such licensed premises required by the foregoing provision, shall be wilfully obscured by the licensee or by him wilfully suffered to be obscured or in any manner obstructed, then such license shall be subject to revocation in the manner herein provided ..."

Paragraph 183 of the Statute reads as follows:

"Any person ... who having obtained a license hereunder shall violate any of the provisions of this Act ... with respect to the maintenance of the licensed premises, or shall violate any other provision of this Act, shall for a first offense be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500) ..." (Italics supplied.)

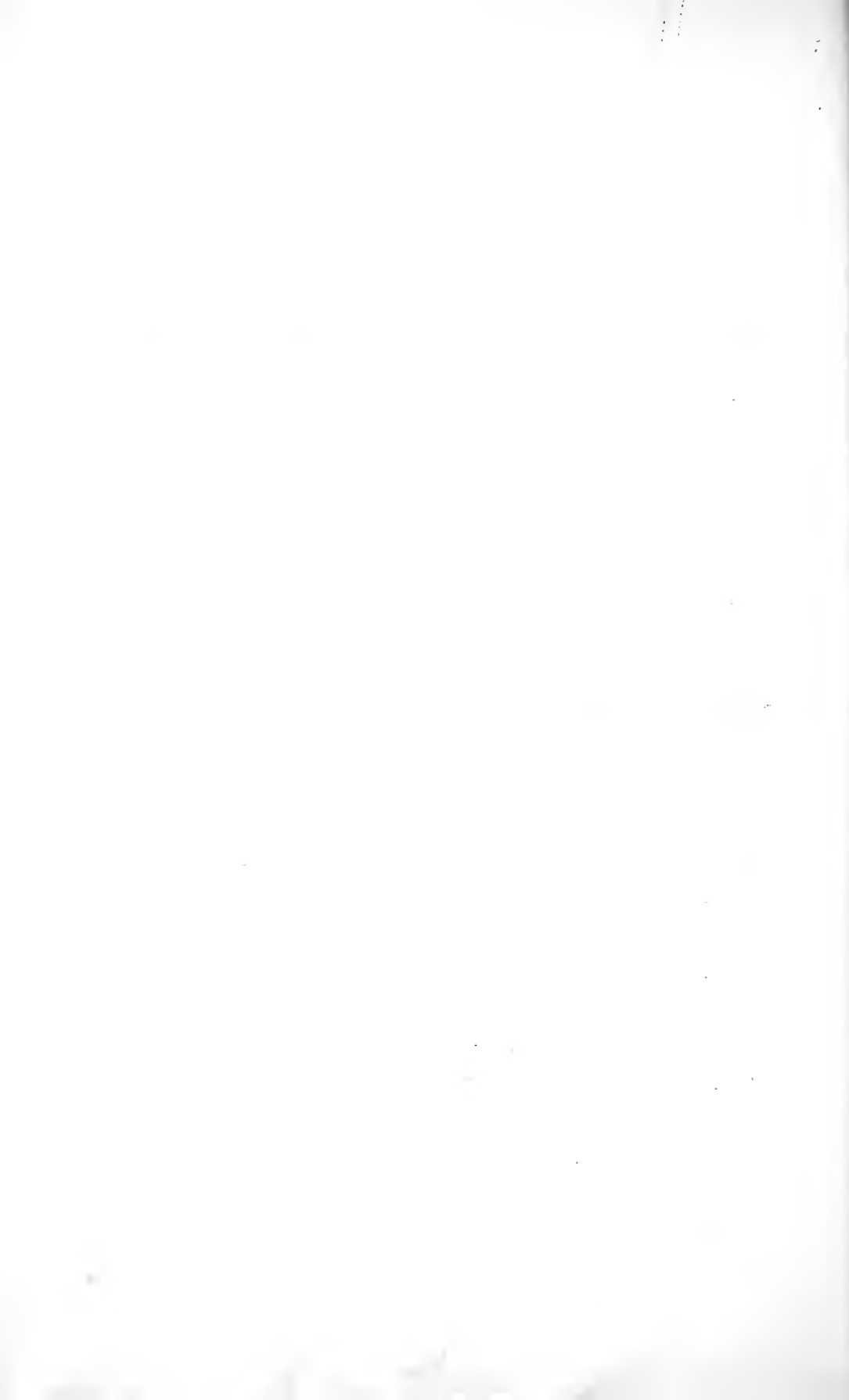
Paragraph 141 of the Statute, supra, provides in substance that if persons operating taverns do not operate them so that a clear view of the interior may be had, or fail to have them properly lighted, such acts constitute violations of the Statute. This section further provides that if the view is willfully obscured or in any manner obstructed, then the licensee may have his license revoked. This section of the Statute provides no penalty except the revocation of the license.

Paragraph 183 of the Statute, supra, provides in substance that any licensee who shall violate any of the provisions of the act with respect to the maintenance of the licensed premises shall be subject to a penalty. For the first offense it shall be not less than \$50.00 nor more than \$500.00.



The defendants contend that the fact that the legislature has seen fit to permit a revocation of a tavern owner's license if he willfully obstructs the view or improperly lights the interior of his tavern, prevents the tavern owner from being subject to a fine for violation of paragraph 141. They urge that this makes the Statute, in some manner, ambiguous, and that the legislature must have intended only to have the tavern owner's license revoked, and did not intend that he be punished by imposition of a fine.

In our opinion the Statute should not be given defendant's construction. This Statute is similar to many other criminal statutes in this State which define the crime in certain sections of the statute and by a later section provide the penalty. We can find no authority that this type of statute is invalid. A liquor license is a mere privilege conferred to pursue a business which is peculiarly subject to police regulation, revocation, and control. There is a plain distinction between a withdrawal of a special privilege under a license which has been abused and terminated, and the penalty which the law imposes as the punishment for its violation. (State vs. Harris, 50 Minn. 123, 52 N. W. 337.) The offense is created by statute and the punishment is fixed by statute. This is not inconsistent or unreasonable in any way. A revocation of the dram shop license is an incidental consequence and is not to be considered a punishment for the offense. (State ex rel. Connally vs. Parks, 199 Minn. 622, 273 N. W. 233; Commonwealth vs. Funk, 323 Pa. 390, 136 Atl. 65.) This precise question has never been passed on by the reviewing courts in this state. An analogous case is People vs. Kobylak, 333 Ill. 432. In this case the defendant was charged by information with operating his motor vehicle while under the influence of intoxicating liquor. The criminal statute involved in the above case provides that the defendant upon conviction may be fined and have his chauffeur's license



revoked. The constitutionality of the statute was challenged, it being alleged that the statute violated sections 2 and 3 of article 2 of the Illinois Constitution, or the Fourteenth Amendment of the Federal Constitution. While the facts are not the same as the instant case, the language of the court is analogous to the law and the facts here. The court says on page 435 of the opinion: "The revocation of the driver's license for one year by the Secretary of State is part of the regulatory measures under the police power of the state governing traffic upon the highways. It is no part of the punishment administered by the court, and does not constitute the loss of any property or civil right."

It seems to us that it would require a strained construction of the statute to say that the legislature only intended the license of the person who sells liquor to be revoked, and that he could not be otherwise punished for failing to comply with the requirements of the statute. The statute is plain, clear, and unambiguous. It is apparent that the legislature intended that persons who violated this statute should be punished by fine and not merely have their licenses revoked. Statutes are to be construed sensibly to carry out their purposes. A sensible construction of this statute requires that the informations be held good. The informations stated a crime against these defendants under the words of this statute, and the trial court was in error in quashing them. The order of the trial court quashing the informations is reversed in both cases, and the causes are remanded with directions to overrule the motions to quash.

Reversed and remanded,

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2000/11/10

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